E NEXT ANNUAL MEETING WILL BE HELD AT MEMPHIS, TENN., OCT. 23-25

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RRENT LEGISLATION—CURRENT LEGAL LITERATURE—STATE BAR NEWS

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TABLE OF CONTENTS

AMERICAN BAR ASSOCIATION
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California Law and Pre-Legal Educational Requirements

AN astonishing bill, to those interested in educational requirements for admission to the Bar, was passed by the California legislature at its recent session. What is more surprising, the Governor of the State, whose veto was expected almost as a matter of course in well-informed quarters, has actually approved the measure. The result is that if the legislation is valid, there can be no requirement of pre-legal education in the applicant for admission to the Bar.

The measure which registers this remarkable departure from the current trend to elevate the educational standards of the legal profession is the so-called Hornblower Bill—officially entitled "An Act to amend section 24 of the 'State Bar Act,' approved March 31, 1927, relating to admission and licensing of members of 'The State Bar of California.'" It consists of one paragraph, and provides that "with the approval of the supreme court, and subject to the provisions of this act, the board shall have power to constitute and appoint a committee of not more than seven members with power to examine applicants and recommend to the supreme court for admission to practice law those who fulfill the requirements. Any person over the age of twenty-one years may apply to the board for admission to practice law upon presentation of satisfactory testimonials of his good moral character, together with satisfactory proof that for at least three years he has diligently and in good faith studied law. With the approval of the supreme court the board shall have power to fix and collect fees to be paid by applicants for admission to practice, which fees shall be paid into the treasury of the state bar."

While the bill was in the Governor's hands for consideration a special committee, appointed at a meeting of the Board of Governors of the State Bar, presented a very strong memorandum to His Excellency setting forth various reasons why it should be disapproved. The memorandum argued first that the amendment was so loosely drawn, ambiguous and uncertain that it should not become a law. On this point the special committee said:

"While it was probably the intention of the author of the bill to provide that any person twenty-one years of age, of good moral character and who has studied law for three years, may take an examination for admission to the Bar, the amendment does not so provide and it is uncertain as to how the amendment would be construed.

"What the amendment says in this regard is that any such person may apply *'for admission to practice law,'* and further, that he may make such application to the 'Board.'

"The Committee of Bar Examiners is given power to 'examine applicants' but the 'Board' is given no such power. The applicant who fulfills these three requirements is not told to apply *for examination* to the Committee of Bar Examiners but he is told to apply to the *Board,* meaning the Board of Governors 'for admission to practice law.' It is nowhere expressly provided that such an applicant may be examined. It may be implied that the applicant may be examined in order to determine three things, namely, (1) Is he over the age of twenty-one years? (2) Has he presented satisfactory testimonials of good character? (3) Has he given satisfactory proof that for at least three years he has diligently and in good faith studied law? These are the only 'requirements' that the amendment would leave in the law and the Committee is to 'recommend to the supreme court for admission to practice law those who fulfill the requirements.'

There is no 'requirement' that such an applicant shall be learned in the law or that he shall have learned any law during his three years of study, nor is there

any 'requirement' that he take an examination in law. He does not apply *for examination* and he is not required to apply to the only body that is given power to hold examinations, namely, the Committee of Bar Examiners, but he may apply to 'the Board for admission to practice law'; but the Board has no power to grant his application, for the Committee is to recommend to the supreme court—for admission to practice law—those who fulfill the requirements.

"It is not clear from the bill that the applicant 'for admission' need fulfill any 'requirements' other than the three above enumerated. He is not required to be a citizen or a resident of California, or to be able to speak, read or write the English language. There is no 'requirement' that he should have studied the statutes or the common law, or any law of California or of any other state in the Union, or that he should have carried on his studies in any particular place. All that is required is that his three years study of law shall have been carried on 'diligently and in good faith.' It is not clear that his study of the law may not be carried on exclusively in some foreign country or that his study may not be confined to the civil law or to the French code or to the laws of some other country."

The memorandum then points out that the amendment sweeps away safeguards that have been set about admission to practice law from the time that California became a state. From its admission to the Union it "has been the policy of the law that an applicant for admission to practice law should possess what in the opinion of the Supreme Court or the District Courts of Appeal, were the necessary qualifications of learning and ability. . . . No language of the acts was general, referring to 'necessary qualifications of learning and ability' (until 1919 when the law was made more specific); but it was always left to the courts (first the Supreme Court, later the District Courts of Appeal and again, later, the Supreme Court) to fix these qualifications. The proposed amendment takes the power from the courts and, instead of fixing any standard, requires with respect to education merely satisfactory proof that the applicant 'for at least three years has diligently and in good faith studied law'—not that he has the necessary qualifications, but merely that he has studied—which long experience has shown may be a very different thing."

Attention is then directed to the fact that the Amendment abolishes the requirement, in effect since 1851, that only citizens or those who have declared intention to become such may be admitted to practice law. The opposition of the Amendment to the current of development in California and elsewhere both with respect to legal education and general education is next emphasized in forceful fashion. In this connection the preliminary educational requirements for chiropractors, chiropodists, barbers and various other callings—all much higher than those for lawyers—are set forth in tabular form and furnish an ironic commentary on legislative consistency and breadth of view. Under the heading "The Amendment Is Not Necessary" the Memorandum presents the proposed rules for admission to practice law prepared by the Board of Governors of the State Bar and "now awaiting action by the Supreme Court," and shows their essential reasonableness and fairness to applicants as

well as to the public. "There is nothing," the Memorandum states, "in the proposed rules that prevents properly qualified persons, whether educated in school or not, from being admitted to practice law. But even if the proposed rule requiring one or two years of college education be thought too high, since it does not become effective until after the meeting of the Legislature in 1931, it presents no reason why the act should be amended now and particularly no reason for the enactment of a law that prohibits the requirement of any kind of pre-legal education for members of the bar." And it adds the following pertinent observations:

"The fundamental question involved is, who should have the power to regulate, not what the regulations are. Heretofore the power of prescribing rules governing admission to practice has always been reposed in the courts. By the State Bar Act it was vested in the Board of Governors of the State Bar but their proposed rules must be approved by the Supreme Court before they become effective so the subject is still controlled by the Supereme Court. This plan took into consideration that the Committee of Bar Examiners who came in contact with the applicants for admission and who in turn were appointees of the Board of Governors, would meet with the Board of Governors and evolve rules which would be based on their experience and study and which, when finally adopted by the Board, would be submitted to the Supreme Court for its approval. In this way three groups of persons, who it is fair to assume would have some expert knowledge of the problems involved, would give consideration to any changes,—the three groups being the Committee of Bar Examiners, the Board of Governors and the Supreme Court. It is most respectfully urged that these persons would give careful study to the problems. As a matter of fact before the proposed rules which have been presented to the Supreme Court by the Board of Governors were drafted, over twelve months of study was given to the problems. These rules recognize the fact that while every lawyer must study law, all his professional life, there are many who will never follow their pre-legal education beyond their school days. The Hornblower Bill sweeps aside all of the results of this effort and undoes the work which has gone on in California for many years toward raising the standard for admission to practice. It puts the state back into a position which is less satisfactory than that in existence before 1919, or 1921, when sections 276 and 276a of the Code of Civil Procedure were enacted. It makes it impossible to fix any standard of general education for the legal profession and in this respect turns toward the dark ages."

Executive approval of a measure so wrong in policy as the one dealt with in the above extract presents the profession in California with a serious problem, but no one will doubt its ability to solve it ultimately in a satisfactory manner.

Virginia Council Considers Improvements in Laws

IMPROVEMENTS in common law, chancery and criminal procedure have been recommended in committee reports submitted to the Judicial Council of Virginia at a meeting held in Richmond on April 30 of this year. The committee on criminal procedure suggested for the Council's consideration a number of changes to increase the speed and efficiency of criminal trials. Some of the measures suggested are that prosecutors be allowed to proceed by either indictment or information except in the case of crimes punishable by more than ten years in the penitentiary; that prosecutors may comment on the failure of the defendant to testify; that a short form of indictment be provided; that the judge may sum up the evidence and state the issues for the jury; and that the jury be authorized to state whether or not the accused is guilty, and let the court fix the punishment.

The committee on chancery procedure recommended to the Council that the Code be amended so as to require a defendant in equity to file his answer within sixty days after the filing of the plaintiff's bill, instead of the present period of six months, which the committee calls "grossly excessive." Also, the answer should not be evidence in the defendant's favor, says the report, unless answers under oath are requested to certain interrogatories. At present, a plaintiff can always prevent the answer from being evidence for the defendant by waiving answer under oath, and the suggested change, the committee points out, would accomplish by statute what has become a matter of course. Another suggestion is that trial judges be authorized to require the evidence in all suits in equity to be given orally in open court, whenever they deem it proper.

Among the suggestions for the improvement of common law procedure made by the committee on that subject, is that in actions on notes, a plea in bar should require an affidavit stating the nature of the defense. Under the present practice, a defendant may prevent judgment by simply filing a plea of the general issue, when he may in fact have no real defense.

A rule of court to bring about a uniform practice respecting continuances and a uniform rule to prevent the examination of witnesses beyond re-examination without consent of the court, are also suggested.

The desirability of choosing justices by popular election is questioned by the Council's committee on statutory amendments. Justices of the peace, mayors of towns, and police justices in larger cities are the only judicial officers elected by popular vote in Virginia. The committee's report says:

"As election by popular vote is not considered a satisfactory means of selecting higher judicial officers, it is even less satisfactory in selection of these minor but most important judicial officers. As other judicial officers are appointed, so it is believed if trial justices are appointed their courts will perform satisfactorily the important duties which devolve upon them."

The committee reports will be acted upon by the Council at a meeting to be held in Hot Springs, Va., in August.

At the April meeting the chairman of the Virginia Council, Chief Justice Robert R. Prentis of the Supreme Court of Appeals, introduced as a guest of the meeting Professor Hugh N. Fuller, of the Institute for Research in the Social Sciences at the University of Virginia. Professor Fuller informed the Council that the Institute was making an investigation of the criminal records of the courts of 24 Virginia counties and eight cities, covering one-third of the population of Virginia.

The records of these courts for the years 1917, 1922, 1927 and 1928 will be studied, to find what changes are taking place. The survey in this way will analyze between ten thousand and twenty thousand cases. The conclusions reached from this survey, Professor Fuller said, will probably be ready to submit to the Council by June, 1930.

Bancroft Scholarship for Japanese Youths

HEIRS of the late Edgar A. Bancroft, who died in 1925 at his post as ambassador to Japan, and who was a former Associate Editor of the JOURNAL, have created a scholarship in his memory, to provide for the education of Japanese youths in American colleges, the State Department was recently notified by Edwin L. Neville, American charge d'affaires at Tokio. The fund, at present amounting to $100,000 and later to be increased to $150,000, has been placed in the hands of trustees, who, it is stipulated, must be Japanese subjects, educated at least partly in colleges in the United States. Count Kabayama and Baron Dan are outstanding members of the board of trustees. An interesting feature of the plan of the trustees is to have the students whom they send to the United States on the Bancroft scholarship pursue their studies at small colleges where there are few or no other Japanese students. It is intended to maintain a maximum of four students at different educational institutions.

Air Law Institute Planned at Northwestern University

THE first air law institute in the United States is being planned by Dean John H. Wigmore of Northwestern University school of law. The establishment of such an institute, in connection with the university's law school, has been proposed by Dean Wigmore to the board of trustees of the university, and a committee has been appointed by President Walter Dill Scott to consider the proposal.

The plan calls for a collection of books and a series of lectures by authorities from England, France, Germany and Italy, dealing with the intricate legal problems that have sprung up in the wake of the rapid development of aviation. Professor Frederick W. Fagg, a graduate of Northwestern University, who has recently returned from Germany, where he was exchange professor of the Air Law institute of Koenigsberg, has been recommended by Dean Wigmore to be director of the proposed institute. A group of Chicago patrons of aviation have agreed to underwrite the project for the first three years.

"The whole body of property laws must be reconsidered with regard to the air," states Dean Wigmore. "Everything that is happening on earth soon will be rehappening, under different conditions, in the air. The law, as it relates to aviation, is chock full of problems that must be worked out. These concern the liability of carriers, whether the owner of a ship or the pilot is responsible, the licensing of pilots and airplanes and other problems. It took 200 years to work out the liability of common carriers. Similar laws must be worked out for air carriers."

Motor Routes to Memphis

INTERESTING and useful information for members who intend to motor to the Annual Meeting of the American Bar Association to be held in Memphis Oct. 23-25, has been kindly furnished the JOURNAL by Mr. John C. Ottinger, Jr., Publicity Director of the Chamber of Commerce of that flourishing city. "Motor visitors from the east," he says, "come into Memphis over the newly completed Memphis-to-Bristol Highway, a paved route across the whole of Tennessee, from Bristol, where the motorist from the east first strikes the state. Through Knoxville, Nashville and across the Tennessee River, this route brings all eastern travelers to Memphis. It is State Route No. 1, likewise the Broadway of America.

"From Chicago one travels on Illinois No. 1 south to Metropolis and across the Ohio on the new Brookport Bridge; thence on U. S. No. 45 through Paducah to Fulton, and then on another paved Tennessee highway, No. 3, to Memphis, the Jefferson Davis route.

"From St. Louis two routes are offered, east and west of the river. On the western shore one follows the Mississippi River Scenic Highway U. S. No. 61, much of it paved and all of it at least smoothly graveled, all the way into Memphis. On the eastern shore the motorist from the mid-west takes Illinois No. 15 through East St. Louis to Ashley, U. S. No. 51 from Ashley to Cairo and on to Fulton, Ky., where one strikes the Tennessee link of the Jefferson Davis Highway, like the traveler from Chicago, on into Memphis.

"Northern visitors who choose a route that leads from Cincinnati to Louisville and further south, take No. 31, U. S., from Louisville across Kentucky, Tennessee, routes Nos. 41 and 11 to Nashville, where the Broadway of America, or the Memphis-to-Bristol, offers its paved thoroughfare across middle and west Tennessee into Memphis.

"From New Orleans north to Memphis one also uses a portion of the Jefferson Davis Highway from Jackson into Memphis. The route from New Orleans all the way to Memphis, however, is numbered U. S. No. 51.

"The Bankhead Highway provides the route into Memphis from Atlanta, Birmingham and the Southeast. Another smoothly graveled route brings the traveler to within 20 miles of Memphis, where a new concrete boulevard will take the motorist on into the city.

"From the west most travelers will come over U. S. No. 70, which connects Memphis with Little Rock. From Texas and the Southwest one can come into Little Rock over the Bankhead route, through Dallas and Texarkana. From Oklahoma and the far west, over the Lee Route. Both converge at Little Rock and coincide en route to Memphis.

"The Old Spanish Trail provides another picturesque route from the West, coming toward Memphis through Lake Charles, La., and Greenville, Miss. U. S. No. 90 from Houston and San Antonio to Lake Charles, the routing there shifting to U. S. No. 165, to Lake Village, Ark., and the Mississippi River ferry. Thence north to Memphis on another sector of U. S. No. 61, the Mississippi Valley Scenic route, through the fertile farmlands of the

Mississippi delta, richest cotton growing section of the world.

"The Memphis Airport, formally opened on June 14-15, presents a fourth division of transportation and makes Memphis equally a point to be visited by air, as by train, automobile or river.

"An A1A port, according to Department of Commerce regulations, representing an investment of more than $500,000, the new field offers to visitors who come by air the same hospitality that other facilities offer those who come by more conventional means. Just seven miles southeast of the business center of Memphis, it is reached by a new boulevard that provides a quick thoroughfare to the loop center in less than 20 minutes. This port is mid-south headquarters for the Curtiss Flying Service, Inc., and the Universal Aviation Corporation. There also Memphis will welcome its lawyer-visitors."

Free Confidential Legal Advice to Judges

A NOVEL development of the functions of legal research organizations is suggested in a letter from Mr. William W. Cook of the New York Bar, read at the Founders' Day Dinner of the Lawyers Club of the University of Michigan. He mentions the giving of "free confidential legal advice to judges, high and low, when requested in difficult cases," as one of the directions which legal research work should take. "Practically all of the higher judges and many in the lower courts even now have secretaries to assist them in looking up the law in pending cases," he says. "And then there are legislative committees, the Attorney General and even the Governor himself. The assistance of a disinterested, learned, and highly intelligent research staff would be acceptable and appreciated. Many a judge would be glad to avail himself of such advice, if given willingly, cheerfully, confidentially, and without charge. This is new and capable of great development and will be very useful if (as is hoped) the judges go to Ann Arbor to work out difficult decisions at the new Legal Research Building, which will have ample research rooms for them with convenient access to the books. This means that a legal research staff may become a most useful agency for effective co-operation with the courts. It will also bring the law schools into close contact with the courts."

Mr. Cook, as is generally known, is the founder of the Lawyers Club at Ann Arbor, an institution which counts the furtherance of legal research among its most important objects. Visitors to Ann Arbor during the meeting of the American Bar Association at Detroit will scarcely forget the beautiful buildings in which the club is housed and which were a gift of the founder.

Celebration of Constitution Week

THE Committee on American Citizenship of the American Bar Association, of which Hon. F. Dumont Smith is chairman, has started a campaign to secure widespread observance of Constitution Week, which commences on Sept. 15. To this end the chairman has sent a letter to the lawyers in the various states associated with the committee's work outlining the action which is needed to insure success. "It is our desire," the letter states, "to have the lawyers of your territory organize for the celebration of that week, the most important event in our calendar. Wherever there are local Bar Associations we hope you will get in touch with them and see that they organize their towns and cities.

"Our object is to have a luncheon or some sort of a meeting of each of the Civic bodies like the Chamber of Commerce, Rotary Club, Women's Clubs, D. A. R., etc., and each of your schools addressed by a local lawyer; and to secure the co-operation of the newspapers, to advertise these meetings, names of the speakers, and report the speeches. To that end we furnish our suggestive pamphlet free of charge 'The Handbook on the Constitution,' 'Declaration of Independence and Constitution, with Introduction,' and 'The Constitution in Our Schools.'

"Send a request for as many as you can use to: AMERICAN BAR ASSOCIATION, 209 South La Salle Street, Chicago, Illinois.

"We should appreciate a personal report from you at some time after the week is over. In towns where there are no local Bar Associations, try and secure some local lawyer who is patriotic enough to carry on the work. We are starting this campaign now because so many lawyers are away on their vacations in July and August, and are too busy upon their return to get the organizations accomplished."

Paramount Problems of the United States

A PREFERENTIAL vote on the paramount problems of the United States taken February, 1929, by the National Council of the National Economic League reveals the opinion that the outstanding problem is "Crime, Disrespect for Law," and that the "Administration of Justice" is a close second to that. "Prohibition" comes third in the list, while Agriculture and Farm Relief, the World Court, Prevention of War, Taxation, Ethical, Moral and Religious Training, Flood Control, Disarmament and Limitation of Armament follow in the order named. "Personal Liberty," a phrase which we see employed frequently in the press nowadays, is relegated to a position of relatively minor importance on the list, only 328 members voting for it as the outstanding problem as against 1,563 for Crime and Disrespect for Law and 1,399 for the Administration of Justice. One would say that "trusts and monopolies," "railways," "The Monroe Doctrine," and "Public Utilities" even have totally ceased to present serious problems to judge by the mere handful of votes these subjects received.

The Semi-Centennial Fund

THE sub-committee of the Executive Committee appointed to carry out the purpose of the Seattle resolution establishing a Semi-Centennial Fund of $50,000 will no doubt have an interesting report to make by the time of the next annual meeting. Even at this early date quite a number of responses to the circular sent out on June 17 have been received, and the indications are that the project has the approval of the membership. The purpose of the fund, as stated in the circular, is "to provide for the award annually of the American Bar Association Medal to a member of the Bar in

the United States who shall have rendered conspicuous service to the cause of American jurisprudence, and to provide for a three years scholarship in an accredited law school to be awarded each year to a graduate of an American college or university." The personnel of the Committee of Award is such as to arouse additional interest in the project. Justice Sanford, of the United States Supreme Court, Hon. Charles Evans Hughes, Hon. Frank B. Kellogg and Hon. George W. Wickersham have consented to serve on this committee. The sub-committee which has been charged with the duty of raising the fund is composed of J. Weston Allen, Chairman; President Gurney E. Newlin, Silas H. Strawn and Bruce W. Sanborn.

Seals Under Recent Massachusetts Legislation

IT has been customary in America as seals grow obsolete to abolish them. Massachusetts has just taken a different course. Instead of abolishing seals her recent statute (Chapter — of the Acts of 1929) provides that

> "In any written instrument a recital that such instrument is sealed by or bears the seal of the person signing the same or is given under the hand and seal of the person signing the same, or that such instrument is intended to take effect as a sealed instrument, shall be sufficient to give such instrument the legal effect of a sealed instrument without the addition of any physical seal."

The difference is that all the very convenient common law of seals survives. Where it is abolished an option cannot be donated and it is necessary to go through the rigamarole of some small common law consideration. The absence of seals may create serious question about the execution of bonds by sureties where no consideration passes from the obligee. People sometimes desire to create obligations without consideration, as in the case of a marriage settlement. In Massachusetts a binding offer to sell land can be and is often most conveniently made by affixing a seal and setting a date to which the offer is open.

The writer makes this contribution with a microscopic amount of family pride because he ends by referring to the previous article by his father, the late George S. Hale, on Seals, 1 Am. L. Rev. 1.

RICHARD W. HALE.

The New Federal Naturalization Law

THE Americanization Committee of the Ohio State Bar Association has recommended that the new Federal Naturalization Law, effective July 1, 1929, be carefully studied by those interested in this kind of legislation, according to the Ohio Bar Association Report. Under the new law we are told, aliens who entered the country either without a certificate of inspection or illegally may be naturalized without obtaining a certificate of arrival. The following synopsis of some of the radical changes in the new law was prepared by Hon. G. A. Green of the Ohio Americanization Committee: (1) The increase of fees for the first papers, including a certificate of arrival, will be from one to ten dollars. (2) The increase of fees for the second papers, including a certificate of arrival will be from four to twenty dollars. (3) A provision for the naturalization of aliens who entered the United States either illegally or without inspection prior to June 3, 1921. This, among other things, will assist those of Canada who are regarded as illegally in the United States, having entered years ago as visitors. (4) The requirement of photographs for both first and second papers. (5) A provision defining continuous residence in the United States. Absence from the United States for a period of over one year within the five-year period is fatal to the continuous residence as required by law. It is, therefore, necessary that a new beginning be made for the five years' residence period. (6) Depositions under the new law will be permitted within the state or county. (7) Alien soldiers who were honorably discharged from the last war will, under the new law, obtain special privileges. They will not be required to pay any fees, obtain a certificate of arrival, wait the usual ninety-day period after filing or pass an examination on government.

Felonies and Disbarment in North Carolina

A NICE distinction between felonies which justify disbarment and those which do not is contemplated in an enactment by the North Carolina legislature this year. According to the North Carolina Law Review, the enactment in question "amends section 205, which was susceptible of the construction that upon conviction or confession of *any* felony, the respondent *must* be disbarred, but in case of any other crime the disbarment would only follow if the court deemed the crime such as showed him to be unfit to be trusted in the duties of the profession." By the new amendment disbarment for felony also is subject to this same restriction, *i. e.*, it must be adjudged that the felony is one which shows the lawyer as unfit to be trusted." And it adds, "it may be argued that the standing of the profession was better protected by a rule which assumed that, regardless of individual professional trustworthiness, a convicted felon should be excluded from its ranks." The Review also calls attention to another statutory enactment passed at the recent session which confers power on the judge of the Superior Court to institute an investigation into any reported cause for disbarment or suspension and to appoint from three to five lawyers as commissioners with power to summon and examine witnesses.

Mussolini to Curb Lawyers' Oratory

THE eloquence of Italian criminal lawyers, proverbial since the days of Cicero, will suffer rude curtailment in the new Italian code of criminal procedure which a commission of Fascist jurists is now completing, after several years of labor, according to a news dispatch. Il Duce has in the past many times publicly advocated limiting the arguments of lawyers in criminal cases, and the new code conforms to his views by limiting defense lawyers in cases where witnesses are available, to forty minutes for their preliminary addresses and three hours for their final arguments.

Another provision of the proposed code just announced by Minister of Justice Alfredo Rocco abolishes public trials in all cases in which publicity

might damage the fundamental interests of the state, disturb public order and morale or excite "undesirable curiosity." The power of juries is strongly limited. Appeals to higher courts will be allowed only in cases of extreme importance, thus relieving them of the mass of small cases which now take up a large part of their time. The whole effect of the new code will be to expedite the working of justice in accordance with fascist conceptions.

Jurors' Handbook Found Helpful in Canal Zone

THE primer for jurors, which has been used in a number of states to give jurymen an understanding of the fundamental elements of a court trial, has also been found helpful in the United States District Court in the Canal Zone, we are informed by Mr. G. H. Martin of Washington, D. C., former District Judge in the Canal Zone.

Former Judge Martin, having read the article in the July number of the Journal concerning the use of such a primer or handbook, has written to the Journal, enclosing a copy of the Handbook used by him in the Canal Zone. He says: "The New York Primer for Jurors mentioned in your article was called to my attention late in 1925, when I was judge of the district court of the Canal Zone. Great difficulty had been experienced there in getting juries to convict even in cases where the guilt of the accused was plainly proven. Believing that such a primer for jurors would aid in the administration of justice, I used the New York primer as the basis of a 'Handbook for Jurors' for use in the Canal Zone. You will observe from the copy of the handbook enclosed that it includes criminal as well as civil matters, while the New York primer, as I remember it, dealt only with civil cases. The use of this handbook was very beneficial in the Canal Zone. This statement is made from observation of the results in jury trials there from a time early in 1926 to March, 1929, when my term of office expired."

Ohio Court Shows Record of Efficiency

THE promptness and efficiency of the Supreme Court of Ohio in disposing of cases is shown in a report of the work of the court for the past year, prepared by Chief Justice Carrington T. Marshall. When the Ohio court adjourned on June 15 for its summer recess, the report shows, it had disposed of 235 cases on the general docket, leaving only 36 cases undisposed of. All submitted had been decided when court adjourned. During the same period, the court disposed of 494 contested motions, leaving only 17 motions on the docket. All motions were disposed of except those filed after June 7.

The United States Supreme Court recently made a report of its work for the past year, which won general approbation on the part of the newspapers of the country. The report of the Ohio Supreme Court shows that that court has equalled the commendable record of the United States Supreme Court, for it has disposed of almost as many cases and contested motions, and in addition, has left a much smaller number of cases undisposed of.

OUR SOCIAL FOUNDATIONS AND CURRENT PHILOSOPHY

Bagehot's Theory of Correlation Between People's Political and Moral Speculation and Their Current Philosophy as to Material and Scientific Things—The Growing Area of Uncertainty—Effect on Youth, etc.*

By Hon. Newton D. Baker
Member of Cleveland, Ohio, Bar; Former Secretary of War

MR. CHAIRMAN, Ladies and Gentlemen, I am deeply appreciative of the generous phrase with which Mr. Wickersham has been willing to introduce me to you. So far as he has referred to me as a member of the Institute, I confess a sense of unworthiness. Indeed, in that capacity I relate myself to Thomas DeQuincy who, when asked whether he had profited by his residence at Oxford, said: "I was at Oxford for two years and by actual count I pronounced exactly two hundred words while there." (Laughter.)

It seems to me, however, that whenever a Secretary of War is mentioned in a company of lawyers, it is the duty of one who knows, and I do know, to say that the greatest Secretary of War America ever had is the present undisputed leader of the American Bar, Elihu Root. (Applause.) Without the service performed by Mr. Root in the organization of the General Staff, it would have been quite impossible for America to have made anything like the preparation it did make for the World War. As for my own record in that office, I am still appalled by figures. During that time the War Department spent a million dollars an hour in each of the twenty-four hours of every day, Sundays and holidays included, for a year and five months so that there is at least this much justification for the grievance which I think still remains in the public mind that I was an extravagant person. Indeed, I am still enough remembered as a former Secretary of War to receive an occasional anonymous letter. The last one of this kind, I recall, came from a gentleman in Chicago—I am sorry I do not know his name, he did not give it me—in which he recounted the fact that it is currently reported in the press that the government still had a large amount, many hundred million dollars worth, of unsold surplus war material. After having recited that bit of information, he ended with the exclamatory interrogation, "Wastrel, why did you spend so much?" As a matter of fact, the Secretary of War during the World War was a function rather than a person and I still hear, sometimes with amusement and sometimes with amazement, of things done by the Secretary of War when I was Secretary of War of which I never heard before. (Laughter.)

Tonight I am under the unhappy necessity of catching a train which necessitates my being brief in my response to this privilege of addressing you and I fear the necessity of brevity will result in my being a bit serious.

When President Hoover made his address to the newspapermen he used an engineering term which it seems to me challenges the attention of the people of the United States. Pointing out some of the current distempers of the American people, he raised the disquieting question as to whether these were merely temporary disorders or, on the other hand, were evidences of "a subsidence of our foundations." That phrase keeps ringing in my mind and I find myself asking what are our foundations and are there evidences of their subsidence?

In Spengler's History of the Downfall of the West the theory is advanced that a given order of society, historically considered, lasts about one thousand years and that the evidences of its approaching dissolution are found when skeptics deny and dilettantes toy with the things which up to that time have been regarded as sacred and inspiring.

It is, of course, possible to find incidents in striking confirmation of this theory. The most conspicuous is that of Athens but instead of covering a thousand years, it covered the lives of but two or three generations, and the descent of Athens from the pinnacle of its glory under Pericles to the madness of the expedition against Syracuse was characterized by a dissolving faith in the things upon which Athenian greatness had always theretofore rested. As we see it now, there was a subsidence of the foundations in Athens.

I forbear attempting to array in behalf of this thesis even a small part of the evidence to be found in Spengler's History. Using the statement as a lantern for a search among ourselves, let us try to see whether it is true today that skeptics are denying and dilettantes toying with the things which up to this time have among us been regarded as sacred and inspiring. In this search within the compass of a brief after-dinner speech, we can deal only with more or less commonplace things.

The greatest loss to mankind from the World War was not the vast destruction of property, impoverishing as that was, nor was it loss of human life, which of course, was infinitely more pathetic and tragic, but it was the loss of faith among men all over the world. It has left in the minds of men everywhere a resolute doubt as to the capacity of man in any form of government, absolutist or free, to set up political institutions adequate for the safety of mankind. If one seeks an explanation of the long continued dominance of the handful of

*Address delivered at banquet of the American Law Institute in Washington, D. C., on May 11.

men in Russia he will find it not in the sweetness or attractiveness of the doctrines they teach, nor in the extent of the physical power by which they seek to enforce their philosophy, but in the despondency of the people to whom their mandates are addressed and in the belief that no other form of government can provide anything more safe and secure. Ten years after the conclusion of a war which had in it the impulse to make the world safe for Democracy, we find a substantial part of the world governed by dictators. These new autocracies are not set up among savage or barbarous peoples, but rather in civilized nations in all of which there has been aspiration for popular government and in some of which substantial progress toward that end had been made before the War. The reason for this must be that same loss of faith in the solidity of humanly contrived political institutions.

President Wilson was fond of quoting Bagehot to the effect that the political and moral speculations of a people are ordinarily a reflection of their current philosophy with regard to material and scientific things. Bagehot enlarges that suggestion in his Physics and Politics, but we have further evidence on the subject and the suggestion seems strikingly true when one contrasts the stability of moral concepts, religious beliefs and political institutions of the day when the current material philosopy of the world was the absolutism or positiveness of the Newtonian system with the change which has come about since Darwin. Under the Darwinian Theory of Evolution much of the certainty went out of the philosophical speculations of men. Now today our philosophers and moralists write about "creative evolution," which is a very pale ghost of the categorical imperative of Kant. I hope it will be understood that I am not questioning the usefulness of science or the fine tolerance of the scientific point of view, but from the aspect of having foundations which are certain and sure upon which to base the moralities of modern life and the institutions of political organization, the nescient attitude of science has not been helpful. If one asks the modern scientist his belief on any subject, no matter how simple it may appear, he will, if he be a true scientist, say: "Today my belief is so and so, but I am perfectly hospitable to a demonstration of the contrary and tomorrow I may have an entirely different theory about it." I remember a fellow student in my university days who was devoting his life to research in chemistry who replied to a request for his opinion upon some simple commonplace matter: "I make it a rule never to prejudice my judgment by having opinions." Now, however tolerant and handsome this open-minded attitude may be, it does take something out of the certainty of life to realize that so far as science is concerned, it merely acts upon the hypothesis that two and two are four, but is always waiting for some one to come along with a demonstration that two and two actually do make five.

But the case is even worse than that. We have not only passed beyond the rigidity and certainty of the Newtonian laws, but we have passed beyond even the evolutionary doctrines of Darwin, and the ultimate speculations of physicists and mathematicians now are so transcendental and thin that only a very exceptional man imagines he understands Professor Einstein's theory of relativity. When Hegel was dying one of his friends asked him whether he had any special grief. His reply was: "Yes, alas, only one man has understood me and even he has not." (Laughter.) I confess I have this feeling about relativity that if the political institutions of men and their moral concepts are to pass from the rigidity exemplified by Newton's laws of motion and away from the promise contained in the Darwinian evolutionary theory, that did at least mean that there should be a survival of the fittest, into something so transitory and insubstantial as relativity, then we will have a distinct subsidence of the moral foundations upon which the social order is to rest. In this age we are having less certainty at practically every point. Kant's categorical imperative was a summons to arms. It demanded the resolute activity of the individual will. Creative evolution is a narcotic. No doubt the evolution keeps on evolving and is just as creative when the individual is asleep, but relativity removes us beyond the sphere of action and reaction and brings us into a world of insubstantial relations.

In the field of religion, too, certainty is subsiding. I think men are just as religious as they ever were, but there is a lack of authoritative certainty and finality about religious doctrine today. The code of moral laws which has lasted longer than any other in human history is the Ten Commandments, and the distinctive characteristics of the Ten Commandments are their simple and axiomatic appeal in the matter of substance and their authoritative form.

Perhaps there is no better illustration of the extent to which certainties are being replaced by uncertainties than the present indulgence of mathematicians in non-Euclidean geometric systems. The whole civilization of our race has proceeded upon the finality of the Euclidean axioms, but now the highest scientific minds are proposing to themselves that they build new systems of mathematical speculation based upon assuming the opposite of these axioms. For instance, Euclid assumed that the shortest distance between two points is a straight line, but the non-Euclideans assume that the shortest distance between two points is not a straight line and on that they build a complete system of geometry. They are not like Lewis Carroll writing "Alice in Wonderland" or "Behind the Looking Glass." They are serious scientific people and—I must speak with deference in a field in which I know nothing—they are dealing with the verities of life and are rendering them more and more uncertain. Indeed in every field in which the human mind is occupying itself there is a disposition in religion, in philosophy and in science to pass out of the category of certainties and into a preferred field of uncertainty as to fundamentals.

If all or any substantial part of this be true, if it be the characteristic of our age that it is no longer possible to stir the pulse of youth by saying, "Thus sayeth the Lord," but for every rule of conduct there must be sought out some indefinite, uncertain and relative moral basis; if youth finds itself in a world of uncertainty on the simplest things, how can we expect the old moral standards, or indeed any new ones, as a basis for our social order and civil life to attain any sort of stability.

Happily, I am no Hamlet. I was not born into the world to set right what has gone wrong. Indeed I have nothing in my mind or on my heart to say by way of remedy for the ills of the age in which we live, but I do prophesy that our children will have something to say. I spend a substantial part of my time associating with children and I have had borne in on me the discouraging consciousness that they are disregarding our generation entirely. We have become more or less ridiculous to them. They are polite about it—sometimes (laughter)—but I have had a sixteen-year-old boy say to me, "Well, I don't think much of the civilization you built." And when you really come down to the last analysis and try to find out whether there should be an excusable pride on our part in our achievements, we can only find that we have multiplied the conveniences of life until we have made it so that every man now,—by the calculations of the economist, every man, woman and child in the United States has the equivalent of the services of three hundred slaves at his disposal in the material splendor he has and the comfort in which he lives, but that this vast accumulation of splendor, comfort and enjoyment leads only to a greater Armageddon, and that when the test of our civilization came, it not merely leaned like the Tower of Pisa, but collapsed like the Tower of Babel.

I make these observations not because I am a gloomy person, for I am not. I am always perfectly sure that just around the next corner I shall meet something very pleasant, and that perhaps tomorrow some one will say a word of cheer and comfort that will lead me out of the metaphysical bog in which I seem for the moment to have become entangled. I say it rather because the particular thing that brings this company together is at least one ray of hope. Here is the mind of the American Bar laboring to make at least one thing certain in this confused, uncertain and unstable world. As the Restatement is written out, I constantly have a feeling that my anchor has struck rock and is holding—that I am on firm ground. The old contests at the Bar with a multiplicity of reports, conflicts of authority and absence of definiteness in the statement of the law, tended to make our legal contests tugs of war in slippery soil, so that the harder we pulled, the more we slipped and the worse off we were. After we get these clear, concise and authoritative statements, this uncertainty will depart, and as the result of the labors of this body there will be at least one fountain in the forest—one oasis in the desert. While the other professions are drifting, affected by the philosophical current of our day, the sciences and the arts are being rendered more obscure and the metaphysics of our time more and more impalpable, our profession — the law profession—is setting up sign posts. If we can succeed in making the law certain and clear and simple, our civilization will soon realize that selective obedience to constitutional and statutory mandates is not a sound rule of conduct, and that if we are to have civil order at all, it will have to rest upon the experience of the race as embodied in the wisdom of the law. (Prolonged applause.)

DEPARTMENT OF CURRENT LEGISLATION

Death Taxes—Developments in Reciprocity

By LEO BRADY
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RECIPROCITY blossomed and developed in the year 1929 as a result of numerous reciprocal exemption provisions enacted by the various state legislatures. The usual type of provision was that sponsored by the National Tax Association.[1] There were, however, variations from this model form, which will be discussed later in this article.

The new states which swung into line during the current year were: Arkansas, Idaho, Indiana, Iowa, Michigan, Missouri, North Carolina, New Mexico, South Carolina, Texas, Washington, West Virginia, and Wyoming.[2] These states, when added to the other members of the reciprocal group, comprise thirty-five states which now have reciprocity.

The principles underlying reciprocal exemption and the reasons for the enactment of such provisions have been set forth in detail in previous articles in this Journal.[3] Briefly, the principle of

1. " 'The tax imposed by this act in respect of personal property (except tangible personal property having an actual situs in this state) shall not be payable (a) if the transferor at the time of his death was a resident of a state or territory of the United States, or of any foreign country, which at the time of his death did not impose a transfer tax or death tax of any character in respect of property of residents of this state (except tangible personal property having an actual situs in such state or territory or foreign country), or, (b) if the laws of the state, territory or country of residence of the transferor at the time of his death contained a reciprocal exemption provision under which nonresidents were exempted from transfer taxes or death taxes of every character in respect of personal property (except tangible personal property having an actual situs therein), provided the state, territory or country of residence of such nonresidents allowed a similar exemption to residents of the state, territory or country of residence of such transferor. For the purposes of this section the District of Columbia and possessions of the United States shall be considered territories of the United States.' "

2. For complete citations of these and other states, see footnote 4.

3. Leo Brady, American Bar Association Journal, March, 1927, Statutory Solution of Multiple Death Taxation, and another article by the same author in the June, 1928, American Bar Association Journal on Death Taxes—Flat Rates and Reciprocity.

reciprocity is that State A while imposing a death tax on transfers made by non-residents of intangible personal property within its jurisdiction, notably stocks and bonds of its corporations, will not tax intangibles in estates of citizens of those States which, in like manner, grant a similar exemption to citizens of State A. The purpose claimed by those who sponsor the move is to eliminate multiple taxation on the same property, and, at the same time, to eliminate procedural delay in the transfer of securities.

This idea of reciprocity designed to meet the evils of multiple taxation and procedural delays, goes back more than two decades. It made its first appearance in Massachusetts in the year 1907. Within a few years several states adopted similar statutes, but in its early stages, reciprocity made but a casual impression and was soon repealed by the states which had adopted it. It should not for a moment be thought, however, that the evils had been solved and that there was nothing left to be remedied. As a matter of fact, the situation grew worse from year to year as states reached out and grasped the revenue from any devolution which they could tag as a taxable transfer.

Recently there has been a rebirth of the idea. Four years ago Pennsylvania assumed the lead in enacting a reciprocal exemption provision. It is significant to note that Pennsylvania was also the first state to enact a death tax statute. In 1826 the death tax made its first appearance in the United States on the statute books of Pennsylvania, and almost one hundred years later the reform movement got under way in the same state. It may be that reciprocity is but an expression of the brotherly love which the name of Philadelphia was intended to inspire in the hearts of the residents of Pennsylvania. The idea spread rapidly and today practically three-fourths of the states of the Union are members of the so-called reciprocal group.

Members of the reciprocal group are not all united on a uniform provision. Many of the States have what may be called genuine reciprocity, that is, a tax is imposed generally on transfers of estates of non-residents, but there is an exemption made in favor of residents of those states which either grant a like exemption, or which impose no tax on intangibles in estates of residents of the first state. In other words, there is a genuine *quid pro quo* for the exemption. Heading this group is New York. Several states led by Florida impose no inheritance tax whatsoever, and, therefore, under the provisions of most state reciprocity laws, are entitled to exemption. A large number of states impose no inheritance tax on intangibles of non-resident decedents, although imposing death taxes generally, and these states are also entitled to exemption under most reciprocity laws. A leader of this type of legislation was New Jersey. There is still another group which in application is similar to the New York group, but under a strict construction it is possibly more limited.[4]

It has been pointed out in previous articles on this subject that there is a danger presented by the non-taxing states, such as Florida, for example, and to a certain extent, states not taxing intangibles, such as New Jersey. This danger at present is more or less academic since the estate must pay either the state or the United States. Since the federal estate tax is frequently larger than the state inheritance tax, and since credit is given under the federal estate tax for taxes paid the state, the problem presented by Florida is not acute. Of course, there are cases where the federal estate tax is smaller than the state inheritance tax, and, therefore, residence in Florida may be profitable. If, however, the federal estate tax were repealed, it would profit a rich person to establish residence in Florida, as Florida gets the benefit of reciprocity in most states and therefore a resident of Florida would have to bear no tax on his estate either in Florida or as to his intangibles in reciprocal states.

In an article in the Journal of June, 1928, it was observed that Florida might be considered a real menace to the death tax structures of the various states, and consequently to state revenues derived from death taxes. Accordingly, it was suggested that Florida might well be made a subject of special treatment. Ohio and Oregon have, by departmental ruling, excluded Florida and the other wholly non-taxing states from the benefits of reciprocity, and only recently South Carolina, Texas, Iowa and California have done the same thing by legislation.[5]

At present Florida loses the revenue which it might derive by the imposition of a tax on its own residents, and on non-residents owning property taxable in the state of Florida. Not only does it lose the benefit of the tax without helping the taxpayer since the money now flows into the coffers of the federal treasury, but in some cases, the Florida resident finds that his tax is increased because of the non-imposition of tax by his own state. Paradoxical as it may seem, this is the true situation as is evidenced by the following illustration:

Suppose a Florida resident should die owning an estate of $150,000, consisting of securities in Texas corporations. The Texas inheritance tax levied on transfers made by both residents and non-residents is a progressive tax ranging upward to 20%. On transfers of $150,000, the rate reaches as high as 12%, and the Texas tax properly computed would amount to $14,375. Texas, by specific statutory provision, denies Florida residents the benefits of reciprocity, and, therefore, the estate of the Florida resident would be subject to a tax of $14,375 under the laws of Texas. Federal tax on this amount would be $500, arrived at by taking the statutory exemption of $100,000, and by computing the tax on the re-

4. Properly aligned the states are as follows:
Class 1—California, Laws of 1927, Chap. 646, Laws of 1929, C 884, Sec. 6½; Idaho, Laws of 1929, C 243; Illinois, Laws of 1927, p. 747, Section 5; Iowa, Acts of 1929, C 203; Maine, Laws of 1927, Chap. 231; Maryland, Laws of 1927, Chap. 350; Michigan, Acts of 1929, No. 231; Missouri, Laws of 1929, S. B. 588; New Mexico, Laws of 1929, H. B. No. 304; New York, Laws of 1928, Chap. 330, Art. 10-A, Sec. 248, Laws of 1929, Chap. 144; North Carolina, Laws of 1929, H. B. 44, Sec. 13; Pennsylvania, Acts of 1925, p. 717 at 718, Acts of 1929, No. 435; South Carolina, Acts of 1929, No. 200; Texas, Laws of 1929, H. B. 61; Washington, Laws of 1929, C 202; West Virginia, Laws of 1929, C 14; Wyoming, Laws of 1929, C 111.
Class 2—Alabama, District of Columbia, Florida, Nevada.
Class 3—Colorado, Connecticut, Acts of 1925, Chap. 239; Delaware, Massachusetts, New Jersey, Rhode Island, Tennessee, Vermont, Virginia.
Connecticut was formerly genuinely reciprocal but now by Laws of 1929, C. 299, Sec. 42, it is in Class III.
Class 4—Arkansas, Laws of 1929, No. 106; Georgia, Acts of 1927, p. 101, at 102; Indiana, Acts of 1929, C 65, Sec. 4; Mississippi, Laws of 1928, C 191, Sec. 3; Ohio, Laws of 1927, p. 103 at 104; Oregon, Laws of 1927, Chap. 118. Hawaii is one of the U. S. territories entitled to exemption.

5. Iowa, South Carolina, Texas, California. For citations see 4 supra.
The Texas and South Carolina statutes specifically exclude the wholly nontaxing jurisdiction of Florida, Alabama, Nevada, and in South Carolina, the District of Columbia is also excluded, but in Texas, by peculiar wording of the statute, residents of the District are entitled to reciprocity. The Texas and South Carolina statutes provide "that the provisions of this Act shall not apply to residents of those states which have no inheritance tax law." The California legislature has dealt with the situation with the same result, but by different language. Here it is provided that reciprocity is granted to those states which impose a death tax of some character but which either provide for

maining $50,000 at the prescribed rate of 1%. There would be, at most, an 80% credit amounting to $400, which would reduce the federal tax to $100. Therefore, the combined federal and state taxes would be $14,475. This is the tax payable by a resident of Florida owning a $150,000 estate taxable in Texas. As contrasted with a Florida resident, a New York resident would find himself exempt from the Texas tax because New York and Texas are reciprocal. Therefore, there would be no Texas tax imposed upon the estate of a resident of New York in such case. There would be, it is true, a New York tax, but that tax could be as small as the State of New York sees fit to provide. Under current New York rates the highest tax would be $9,250. In like manner, the Florida tax could be small, or no larger than the 80 Federal estate tax credit, and, therefore, the Florida resident would find himself subject only to the federal tax and the small Florida tax against which would be credited $400 of the federal estate tax. Practically the entire tax could amount in such case only to $500 instead of $14,475. It is apparent, therefore, that the Florida resident does not always profit by the position taken by his state of not imposing death taxes. There are, it is true, cases in which even today the Florida resident may find himself in pocket by virtue of the non-imposition of tax in his state, but on the other hand, there is also the very real situation presented by the type of case above discussed.

It would appear that Florida has awakened to the present situation for there was introduced at the recent session of the Florida legislature a joint resolution authorizing the legislature to levy and collect inheritance or estate taxes.[6] This proposed amendment will be voted on within the next few months at a general election, and very likely will pass. It will be remembered that Florida strongly contested the credit provision in the federal estate tax law and urged that such a measure was unconstitutional.[7] Even some years ago, Florida realized that its appeal to nonresidents to establish residence in Florida would be considerably lessened by the federal estate tax situation which operated as a big stick in protecting state revenues.

It has been pointed out that there is also a possible danger presented by the New Jersey type of statutory provision, which exempts entirely intangibles of non-residents without regard to the treatment afforded residents of New Jersey in other states. This danger may briefly be pointed out as follows: Assume that a resident of New Jersey, prior to his death, disposes of all of his real property and tangible personalty in New Jersey and acquires stock of New York corporations, the shares of which he places in a safe deposit box in New York. It is assumed further that the executor or administrator is appointed in New York where the will is probated. New Jersey taxes its own resident, and, therefore, the resident decedent would be subject to a tax, but how could the State of New Jersey collect the tax? There is nothing against which a lien would operate, and the only thing which the state could secure would be a judgment which probably could not be sued upon in the courts of New York. Recently, the New York Court of Appeals held[8] that Colorado could not enforce its taxing laws in the courts of the State of New York, and it would also so hold when asked to enforce the taxing laws of the State of New Jersey. Therefore, New Jersey, while theoretically entitled to a tax, would find no practical way to enforce collection of the tax. On the other side of the picture, we find that New York grants New Jersey unqualified reciprocity, and, therefore, New Jersey residents would not be subject to tax on intangibles subject to the taxing jurisdiction of New York. Of course, the foregoing again must be viewed in the light of the fact that there is now a federal estate tax, and, generally, it will avail the taxpayer nothing to avoid payment of tax in the states, for he will then have to pay the full federal tax since he has not paid a state tax for which he could obtain credit. Still, there are cases in which it is advantageous to avoid state taxes, particularly in a state where the state tax is greater than the federal tax, and here the type of avoidance above discussed and made, possible by the present unqualified reciprocity provisions would come into play.

Before considering the solution, it should be remembered that primarily reciprocity was advocated in order to avoid multiplicity of taxation. It was not designed to aid complete avoidance of death taxes. Therefore, a plan which retains the primary purpose but eliminates the possibility of avoidance would seem to be the ideal reciprocity plan. To meet this situation, it is suggested that states should grant reciprocity only when the tax has been paid or secured in the state of residence, so that in the illustration above, the New Jersey executor would have to pay in New York if he could not show a receipt from New Jersey. He could still choose the state in which he must pay, however. Iowa seems to have adopted this qualified form of reciprocity.[9] It seems clear that the wholly nontaxing states are excluded from Iowa reciprocity, and it would also seem that residents of the same State, New York, for example, might or might not be accorded exemptions according to whether the intangible personal property in question has been "subjected to a tax or submitted for purposes of taxation in the state of the decedent's residence." However, on this point there has been no ruling from the Iowa Tax Department. It remains to be seen whether the various state taxing officials will accord Iowa exemption. There has been some indication to the contrary by a prominent New York tax official.[10]

Another illustration of the attempt by taxing officials to perfect taxing statutes is evidenced by a recent amendment to the Massachusetts law. Heretofore bonds secured by a mortgage on Massachusetts real estate have been considered an interest in real property for the purpose of death taxation under the Massachusetts law. This same type of property is frequently considered as personalty for death tax purposes under the laws of other states. It had been pointed out[11] that embarrass-

reciprocity or entirely exempt intangibles of nonresidents. For the exact wording of the statute, see Laws of 1929, Chap. 884, Sec. 6½.

6. House Joint Resolution No. 35; A Joint Resolution proposing an amendment to Section 11 of Article IX of the Constitution of the State of Florida relating to taxation and finances so as to provide authority for the State of Florida to levy and collect inheritance or estate taxes under certain conditions.

7. Florida v. Mellon, 273 U. S. 12.

8. Colorado v. Harbeck, 232 N. Y. 71, 133 N. E. 357. Nor could the state resort to the Federal courts, Moore v. Mitchell, 30 Fed. (2d.) 600.

9. Iowa Laws of 1929, Chap. 203.
Tacked on to the Iowa statute is the following:
"In no case shall the provisions of this paragraph apply to the intangible personal property of nonresident decedents unless such intangible personal property shall have been subjected to a tax or submitted for purposes of taxation in the state of the decedent's residence."

10. Mark Graves, Trust Companies Magazine, June 1929, p. 872.

11. American Bar Association Journal, June 1928, p. 309, *et seq.*

ment might result from this situation, for Massachusetts would not grant reciprocal exemption as regards this type of property, whereas other states would probably be constrained to grant exemption under the laws of their own states. Here we have a question of property being considered as realty in one jurisdiction and personalty in another. Recently Massachusetts[12] enacted a provision which exempts this type of property from taxation in estates of non-resident decedents. Therefore, we have another trouble-making feature eliminated from the reciprocity plan.

Reciprocity is not confined to this country, but has an international flavor as a result of the provisions in several state statutes which extend reciprocity to foreign countries. Specifically entitled to reciprocity by virtue of the fact that they grant reciprocity, are Ontario and the Yukon territory in Canada. There are, of course, other foreign countries which are entitled to reciprocity by virtue of the fact that they impose no death taxes at all, or do not impose death taxes on intangibles owned by non-residents. Inhabitants of these countries, too, are entitled to the benefits of reciprocal exemption.

In previous articles[13] the author has pointed out the danger lurking in the statutes of some states which grant reciprocal exemption provided a "like exemption" is made by the laws of decedent's residence. It was suggested that "like exemption" may well be differently construed, in some cases Florida might find itself without the reciprocal group, and in other states Florida might find itself within the reciprocal group.[14] Pennsylvania was the first state to enact the reciprocity provision in the recent movement, and Pennsylvania is one of the states which contained the short provision granting reciprocity where "like exemption" was made in favor of its residents. Only recently, however, Pennsylvania has changed the wording of the statutory provision and the doubtful question of construction has thus been eliminated.[15] The recent amendment is in the form sponsored by the National Tax Association.

There is, however, no reciprocity for death tax purposes between the United States and foreign governments. It is thought that a treaty between this country and foreign governments might bind all states of the United States to reciprocity, but the question arises as to whether this can validly be done. Can the Federal government use the treaty making power to prevent a sovereign state from taxing intangibles of non-residents over which it admittedly has jurisdiction for purposes of taxation?

The Supreme Court has held that a state may tax property passing to non-resident aliens at higher rates than in the case of property passing to residents of the state.[16] The United States, however, by concluding a treaty with a foreign government may assure the nationals of that government equal treatment in the transfer of property and then the nationals of that foreign state must be given equal treatment with citizens. If the power of the state to tax aliens can thus be limited by a treaty, would it not be possible for the United States to go a step further and establish full reciprocity as to these aliens in the manner above discussed? There is, of course, a fundamental difference between the two types of treaty in that in the first type, the state still collects its revenue on estates of foreigners, whereas in the second, it is forced to forego this revenue entirely. On the other hand, however, citizens of the United States can only be assured of the benefits of reciprocity in foreign countries through action of the Federal government unless particular states take advantage of the clause in the Constitution permitting them to make compacts with foreign governments if consented to by Congress. It has already been observed that reciprocity exists between states and foreign countries or provinces by virtue of legislation in the state and the foreign country granting such reciprocity. This legislation, however, is at the will of either of the two governments, whereas if a treaty were concluded, the two governments would be bound to continue the reciprocity as long as the treaty remained in force.

Some progress has been made in the very important field of reciprocity. It is apparent, however, that there is still room for further improvement, and no doubt there will yet be considerable legislation on the subject. Qualified reciprocity will very likely come in for some attention.

12. Massachusetts Laws of 1929, Chap. 292.
13. Supra, (3).
14. Supra, (4).
15. Pennsylvania, Public Laws of 1929, No.
16. Frederickson v. Louisiana, 64 U. S. 445.

Public Service of Tennessee Bar Association

One of the great constructive pieces of legislation passed by the present general assembly is the corporation act. This measure codifies, harmonizes and brings into line with other states, the laws upon the subject of the organization and operation of purely private or ordinary commercial corporations. It is the result of the activities of the Tennessee Bar Association. That splendid organization is responsible for this legislation which will be of great value to the people of the state.

To William E. Norvell, Jr., President of the Tennessee Bar Association, is due a lion's share of credit for the drafting of this legislation and for securing its passage by an almost unanimous vote through both houses of the general assembly. Mr. Norvell has taken his duties as president of the Association seriously. He has worked indefatigably not merely to promote the interests of that organization, but to advance the welfare of the state. The present confused state of our corporation laws might conceivably be more profitable to the members of the legal fraternity than to have them clarified and codified. But Mr. Norvell and his associates took no such narrow and selfish view of the situation. The legislation which they sponsored will redound to the interest and welfare of the people. Every public right is safeguarded and at the same time a system has been provided where it will be easier to form private corporations for any lawful purpose. This act brings our laws in this respect into harmony with the laws of the most modern and enlightened states.—From *The Nashville Tennessean* of April 12.

Crime Commission in California

California's legislature, at its recent session, created a Crime Commission. The measure provides for the appointment by the Governor of a chairman and four other measures to study crime and means to control it. They will hold office at the pleasure of the Governor and will be required to make an annual report to the Governor and a biennial report to the Legislature. The sum of $12,500 plus the unexpended portion of the 1927 appropriation, is given the commission to carry out its work. The measure further provides that the functions of the commission shall be shifted to the new Department of Penology when it is created and that the chairman of the Crime Commission shall become chief of the Division of Penology.

NAPOLEON BONAPARTE AND THE FRENCH CRIMINAL CODE

Personality of the Little Corporal Who Made Himself Emperor Is Imprinted on the Criminal Code Whose Compilation He Directed—Records of Proceedings Show Napoleon Himself Presided Over Discussions Much of the Time and Was Responsible for Adoption of Many of the Code Principles

By Hon. Pierre Crabitès
Judge of the Mixed Tribunals, Cairo, Egypt

THE world knows, in a general way, of the great part which Napoleon Bonaparte played in codifying the Civil Law of France. It was, in his opinion, his outstanding accomplishment. "My greatest title to glory," he said, "is not the forty battles which I have won. Waterloo alone will wipe out the memory of so many victories. I have, however, one achievement to my credit which nothing can efface and which will live until time will be no more. It is my Civil Code."

Until quite recently I did not know what share the Corsican had really taken in the confection of this digest. I assumed that he prided himself upon the fact that the work had been carried through when his star was in the ascendancy and largely as a result of his driving powers. It was not until I had examined source material covering the preparation of the Code Napoleon that the truth dawned upon me. It was then that indisputable evidence convinced me that the words which I have just quoted contain no exaggeration. That incomparable piece of legislation bears the imprint of the personality of the man whose name it carries.

But my present theme does not touch upon that memorable achievement. I am now considering the active rôle played by Napoleon in the labors which produced the present penal legislation of France. I do not think that that phase of his many sided genius has ever been made the subject of serious inquiry. I may be mistaken, but my investigation is, to the best of my knowledge, largely along untrodden paths.

In surveying this field I have had recourse to the same original data to which I had access when the French Civil Code riveted my attention. I refer to that voluminous work known as *la Législation de France*. Its author is Baron Locré. He published it in 1827. It is a collection of the various *procès verbaux* or minutes of the several Commissions which compiled the different French codes.

These *procès verbaux* are admirable pieces of draftsmanship. A Frenchman is a born *chef*. He can make a culinary poem out of any old thing. But a French scribe or secretary is an even more proficient artist. He can draw up the minutes of an assembly with a grace, a conciseness and an accuracy which permit future generations to feel the pulse of the speakers and to know what they said and how they said it.

These *procès verbaux* show, to say a passing word about the Civil Code, that the *Conseil d'Etat* or Privy Council which whipped that compilation into shape, held 160 sesssions. They began on July 17, 1801. They ended on March 17, 1804. I do not know how long each of these foregatherings lasted. All that I may say is that Baron Locré states in his Prolegomenon that they started at noon and that, when the First Consul presided over them, they often continued, without interruption, until 7, 8 or 9 o'clock in the evening. My examination shows that he attended 74 of these meetings and that he entered heart and soul into the discussions over which he presided.

The Civil Code Commission, whose preliminary report was examined by the *Conseil d'Etat*, began its labors on August 12, 1800. The Criminal Code Committee was appointed on March 28, 1801. It was not, however, until after the former compilation had been promulgated that Bonaparte convened the Privy Council to pass upon the work of the latter Board of Experts. The circumstance that the preliminary spade work on both branches of the law went on practically simultaneously shows that he was keenly alive to the necessity of carrying through both measures. The fact that he did not allow both sessions of the *Conseil d'Etat* to go on contemporaneously merely implied that he preferred to concentrate his mind on one job until he had finished it.

The Privy Council began its Criminal Code hearings on May 22, 1803. They form three distinct segments. The first series dealt with both adjective and substantive law. Its labors covered 25 sittings; 13 of these were presided over by the Man of Destiny. It was then found necessary to divide the work into two parts, one known as the *Code d'Instruction Criminelle* and the other as the *Code Pénal*. Twenty-five meetings were devoted to the former compilation. The Emperor occupied the chair on 11 occasions. Forty-one hearings were reserved for the latter digest. Napoleon took part in but three of these deliberations. The last reunion of these various foregatherings took place on January 18, 1810.

The minutes of the first Criminal Code session give one an insight into the military directness with which the Master Tactician wielded his gavel. That initial sitting was very short. As soon as the Chairman had rapped it to order he said: "I direct that the legislative section of the *Conseil d'Etat* prepare within 15 days a syllabus embodying the fundamental principles underlying the Criminal Code." He then arose and added: *"La séance est levée*—the meeting stands adjourned."

It was not until June 5, 1803, that this judicial Committee accomplished its mission. Bonaparte again presided when the Privy Council examined the report

thus submitted to it. He opened the sitting by turning to Bigot-Préameneu and saying to him: *"La parole est à Monsieur le Rapporteur"*—the Chairman of the Legislative Committee has the floor.

The gentleman thus addressed read his report which put the required syllabus into the form of a *questionnaire*. I shall translate it in full.

"Question one.—Shall there by a jury?

"Question two.—Shall there be a 'jury of accusation' and a 'trial jury'?

"Question three.—How shall juries be chosen? From what classes of society shall they be selected and who shall name them?

"Question four.—How and for what causes may one challenge a juror?

"Question five.—Shall the facts be submitted to the court in the shape of transcribed evidence or shall the evidence be partly oral and partly transcribed?

"Question six.—Shall several questions be submitted to the jury or shall it merely be asked to say 'Guilty' or 'Not guilty'?

"Question seven.—Shall it be necessary that the jury be unanimous in order to bring in a verdict? If a majority verdict be permitted what majority shall be necessary?

"Question eight.—Shall there be Criminal Assizes?

"Question nine.—Shall the death penalty be maintained?

"Question ten.—Shall there be 'perpetual' penalties?

"Question eleven.—Shall the State, in certain cases, be empowered to confiscate the property of a condemned man?

"Question twelve.—Shall the law provide a fixed penalty or shall there be a maximum and a minimum penalty?

"Question thirteen.—May a person, who has been convicted of crime and who has served his term, still be kept under observation by the police and may he be compelled to give bond to ensure his future good behavior?

"Question fourteen.—Shall a system be devised for the rehabilitation of convicted persons whose conduct indicates that they are deserving of such consideration?"

It is clear that I cannot attempt to set forth everything that the Son of Laetizia Buonaparte had to say on all of these various topics. I shall, however, choose two or three headings which give one an insight into his reaction to these inquiries. I shall do as he did on that summer day in 1803 and commence with the first question: "Shall the jury in criminal cases be abolished or maintained?"

The first speaker was *Monsieur* Siméon. His address was intended to be, what XX Century American journalists would call, a "keynote speech." It took Locré nine pages to give one the meat of it. *Monsieur* Boulay replied. So did *Monsieur* Regnaud. The latter probably thought himself the very paragon of deliberation and of parliamentary prudence. He suggested that, in order better the elucidate the subject, there should be two committees appointed by the Chair, one made up of "pro-jury" men and the other of "anti-jury" advocates. "They will marshall the respective arguments" said he "and thus give us some concrete basis upon which to act."

The Presiding Office, who had kept quiet while Siméon had held the floor so tenaciously and while Boulay had replied, felt that he should here interpose. He did so in these terms: "The proposal which has just been made would carry us far afield. It is useless. The arguments in favor of the jury system are set forth in one of the reports filed by the Commission. Those who are of a contrary opinion have had ample opportunity to formulate their objections."

Thus apprised that there would be no delay both sides jumped into the fray. The discussion was conducted upon a high plane. Finally, after five different orators had been heard, the Chair said: "No one has answered what I take to be one of the salient points made by *Monsieur* Siméon. He laid stress upon the circumstance that, as in Criminal matters judges and jurors both have the same evidence before them, judges, in such trials, play practically the same part as jurors. They have, however, one marked advantage over jurors. I refer to the fact that judges are better trained and are more carefully chosen than are jurors. Judges are just the type of men who should, to my mind, be selected for jurors if they were not judges." Of course, such a standard for a talesman would strike a criminal lawyer of today as being something almost sacrilegious. But, it is the point of view of a stout defender of law and order and not of a specialist in acquittals that I am endeavoring to define.

Later on, while this same number of the agenda was still before the House the Hero of Rivoli took occasion to make the following statement: "Powerful arguments have just been advanced both for and against the jury system. Let me emphasize a point that has not as yet been stressed. It is this. A tyrannical government would much rather have criminal justice administered by jurors than by judges. The latter are not under his thumb. They have invariably vigorously opposed an encroaching executive. History shows that the most relentless and terrible of tribunals have almost invariably been made up of juries. If these courts, which have left a trail of blood in their wake, had been composed of judges, judicial customs and rules of procedure would have been a rampart against unjust and arbitrary condemnations. The severity, born of the judge's daily contact with crime, is not an element which should be feared as long as trials are held in public sittings and the accused are guaranteed freedom of defense."

And he had another theory about juries which strikes me as being somewhat unusual. This is what he said. "It is a great inconvenience to the average man to put him on a jury. He is thrust into an environment to which he is a total stranger. He knows nothing of the technique of the drama in which he is called upon to play an important part. Before him appear a public prosecutor and counsel for the defense. They are both trained jurists. Those who defend clients before Criminal Courts should be men unbroken to the ropes of that branch of the law. If they get into the habit of arguing before such Tribunals they will soon find out what form of speech will best pull the wool over the eyes of jurors."

And again, along a somewhat analogous line, he said: "Special Courts — Tribunaux d'Exception — should be organized to try offenders who have no known domicile or who go around in bands. Jurors are prone to be afraid of such malefactors. Their fear will tend to make them ready to ease their conscience by lending a willing ear to any defense that may be concocted by such men."

But, notwithstanding all of this, the clear think-

ing Statesman finished by throwing his influence in favor of maintaining the jury system. Throughout the discussion he was heard to ask: *"Comment le jury marche-t-il actuellement?"*—How does the jury carry on these days? Or, again, he would observe: "Above all things we must find out whether the present-day jury is taking a wrong tack." Towards the end he was heard to say: "The jury system is *hors de cause*"—it is no longer a debatable question. And to this he added: "What remains for us to do is to ascertain how we may make of our Courts a truly protecting authority, for to establish security there is nothing comparable to *la Robe et l'Epée*"—the Bench and the Army.

When Question VII was under examination the Man who thus gave precedence to the gown over the sword said: "We must be careful to do nothing that may tend to facilitate undeserved acquittals. If crime go unpunished the consequence will not only be disastrous but may bring about grave political results. The miscarriage of justice will beget tyranny. The primary duty of the executive is to assure the maintenance of law and order. If the Courts fail in their alloted field it will become necessary for the government to take such extraordinary measures as may be called for to keep criminals under control." And then, somewhat further on, he added: "the scale should be evenly balanced as between the accused and society. Indulgence shown by the Courts to criminals is tantamount to cruelty towards society. Weak Criminal Courts will carry tyranny in their wake, for such conditions would call for the intervention of arbitrary power. Today, any man who has money enough to pay a brilliant lawyer and whose fate rests in the hands of a jury is sure of acquittal."

When the *Conseil* met on October 23, 1804, it was called upon to decide whether Criminal Justice should be segregated from Civil Justice or whether Courts should have general jurisdiction. The opinions were fairly equally divided. Scholarly arguments were advanced by both schools of thought. After the discussion had gone on for some time Napoleon said: "Let us look at the question from another angle. I am thinking of the prestige that should surround our Bench. Some say that the dignity of the Court is assured by the number of judges who compose it. Others argue that the consideration enjoyed by our Tribunals is due to the very nature of the judicial office. But one should envisage the problem from still another point of view."

After having laid down his predicate, the Speaker went on to point out that judges who preside over Criminal Courts do not have the same high repute as do their brothers of the Civil Sections. Nor, he urged, have the former the same moral ascendancy over the Bar as the latter enjoy. In elaborating this proposition he used this language: "It is but natural that Criminal judges should not be thought as much of as are Civil judges. Civil Law is a science. Those who master it are men of wide learning. In criminal matters the facts of the case predominate over the purely legal aspects of the cause. In the first instance the judge is called upon to solve knotty problems with which only the most efficient men can grapple. In the second, it is largely a matter of weighing evidence. In addition, it is at the Civil Bar that barristers acquire wealth. Advocates are, therefore, far more prone to show deference to a judiciary whose decisions react upon their earning power than to one which is not such a munificent source of revenue to them."

But while he thus held tenaciously to this theory he did not arbitrarily seek to impose it upon the Privy Council. On the contrary, before that hearing adjourned he ordered the legislative section to submit a concrete draft of his proposal "in order to facilitate discussion." It was this circumstance that largely contributed to the delay in adopting this code.

One of the sittings of the *Conseil* had before it an article setting forth that if, during the course of a trial, a spectator should talk in a loud tone of voice, give signs of approval or disapproval or otherwise interfere with the orderly administration of justice the Court should warn the offender before punishing him. When this section was read, the Author of the Concordat remarked: "That text is fundamentally wrong. It is but proper that anyone who disturbs the trial of a case should be summarily ejected. Such trouble makers may easily become a menace to the public weal. Severity shown to them does not trespass upon the liberty of a citizen. No one has a right to disturb a Court."

Monsieur Berlier replied that the article had provided for a warning so that, if it was not respected, the law maker would be justified in permitting more severe penalties than might otherwise be deemed proper. This brought forth the retort: "No one need fear that any penalty that may be fixed could be too severe when meted out to those who violate the sanctuary of justice. It is necessary to ingrain in the minds of everyone a profound respect for judges. People must be taught that if trials are open to the public a Court room is not a resort maintained for amusement purposes."

I could go on almost indefinitely multiplying instances of the type already outlined. I shall not do so. My purpose is not to paint a miniature but rather to draw a general sketch. I desire, however, to emphasize the fact that even after Austerlitz had brought the youth of Ajaccio to the summit of earthly grandeur his interest in his legislative work did not lessen. I shall cite the *procès verbal* of a hearing which took place after that memorable event.

The *Conseil d'Etat* then had before it a series of articles which were up for final adoption. His Majesty ordered that they be read. He allowed the first two to pass without comment. When they were about to take up the fourth he said: "Wait a minute. Why have you not extended to attempted *délits* (misdemeanors) the same provisions which Article II applies to attempted crimes?" *Monsieur* Merlin and Count Berlier replied to this question. Their answer satisfied Napoleon. The meeting thereupon ratified the text before it.

When Article VI was read the Chairman asked no questions. He at once formulated his objections. He was on familiar ground. The draft before him declared, roughly speaking, that the sole military *contraventions* (petty infractions), crimes and *délits* known to this code are: (1) spying, (2) desertion, (3) inciting others to desert and (4) crimes and *délits* committed by the military when in service. It went on to add that these crimes and *délits*—nothing being said as to *contraventions*—shall be determined and their penalties fixed by the Military Code.

The Soldier of Soldiers was quick to observe: "At the present moment all misdeeds committed by soldiers, when in garrison or on duty, are dealt with by Courts

Martial. Public order does not suffer from this. Military Tribunals are certainly not more indulgent than ordinary Courts. They are, probably, even more severe. You are proposing an innovation. The suggestion requires careful consideration." Instead of following up his argument he stopped and let others speak.

Monsieur le Comte Regnaud de Saint-Jean-d'Angely replied that, while he did not question the severity of Courts Martial, he though that, at some future date, there might be an objection to having Military judges try a soldier accused of killing a civilian. To this *Monsieur de Comte* Defermon added that civilians would feel that their independence was menaced if officers, who had maltreated them, were judged in barracks by fellow officers. He, therefore, favored having the jurisdiction of Courts Martial restricted to offenses committed in camp.

The Military genius who had given Earldoms to the two preceding jurists spoke at some length. His presentation of his point of view may be thus summarized: "The text which we are considering is, to begin with, lacking in clearness. It says that Military Courts shall try soldiers for crimes and misdeameanors 'committed *à l'occasion ou dans le cours du service.*' Such language savors of metaphysics. An enactment, so vaguely expressed, is bound to create confusion. The old law, now no longer applied, was clear cut. The present rule is equally unmistakable. The proposed innovation scraps both of these precedents in favor of a text which judges will have difficulty in understanding."

He then went on to tell his hearers about what was done in the old days and about the existing practice. "In former times," he explained, "the various Parliaments extended their judicial authority to all offenses, such as murder, theft or what not by whomsoever committed. It made no difference to them whether the accused was or was not in the army. His uniform meant nothing to them. They left to the military only such wrongdoing as desertion and violations of garrison orders, in a word such infractions of the law as only a soldier could commit. The present practice goes to the opposite extreme. It considers that the livery of the man removes him from the arm of the civil authorities and that, whatever may be his offense, a Court Martial alone is competent to deal with the offender."

Continuing in this strain, the little Corporal exclaimed: "Choose one or the other of these two systems. If neither suits you, work out a new plan. But let it be clear. It must not be obscure. It would, perhaps, be wise to say that the Imperial Tribunals shall take primary cognizance of all offenses and shall refer to the army authorities those which are of a military nature. What I dread, above all, is an arbitrary text. We can trust our judiciary to do the right thing."

To this *Monsieur le Comte* Treilhard replied: "But this cannot dispense us from the necessity of formulating a definition setting forth what offenses are military and what are not." The answer was promptly given. It was thus expressed: The rule is quite simple. It is covered by the Military Code. All the Penal Code would have to do would be to insert a clause something like this: "all misdeeds which the Military Code declares to be of a Military nature are deemed to be military offenses, within the meaning of this Article."

And then, he who imprisoned the Pope gave another turn to the discussion. "Our priests," he pointed out, "form a body of men, segregated like soldiers from the mass of their fellow citizens. They can, as a result of their ministry, commit a special category of offenses. They can, from the pulpit, incite one man against another. They can jeopardize the liberties of the Gallician Church. They can tyrannize the conscience of the Faithful." In a word, the sum and substance of his study of this Article VI was that it should be rewritten and expanded into a series of texts forming a subtitle of the Code.

I do not wish to be understood as implying that the Privy Council always agreed with its redoubtable leader. It did not. It was not a rubber stamp body. And he was too intelligent not to yield, on purely technical matters, to the specialists who surrounded him. All that I have sought to do is to show that Napoleon Bonaparte, both as First Consul and as Emperor, threw himself without reserve into the elaboration of those Penal Codes which are still applied in France. His work has stood the test of time. This means that it crystallizes the genius of the French people.

The Bar and Civic Leadership

The annual meeting of the St. Louis Bar Association Monday, at which officers were elected, serves as a reminder of the high part this organization is beginning to perform in public affairs, how the members as individuals and the organization as a whole are not only upholding the wholesome ethics of the legal profession but accepting the responsibilities of citizenship. The Bar Association has become a constructive force in the affairs of the community in the last few years, and a potent and continuing influence in establishing and maintaining a high level of professional conduct in St. Louis, a conduct as important to the public as to itself. The Association has gained public respect because it has honestly won public respect. So its high purpose has become a stewardship.

Nor is it a stewardship of slight import or to be taken lightly. We look to our legal minds for leadership aside from the questions of law they solve for us. We look to them for sound and constructive service in civic and social affairs, for leadership in conduct and the graces, for a directing hand as we seek to live peacefully and purposefully with out neighbors.

So it is gratifying to the lay public to learn from a speech made at the annual meeting of the Bar Association that there are evidences of a "growing spirit of cohesion upon the part of the Bar of St. Louis," and that members recognize an "increasing power of impression upon the community as a closely knitted professional unit." Wide recognition of this relationship and the responsibility it implies, full realization by members of the Bar of how much dependence the public imposes upon lawyers as men and not as lawyers, how much we need and value their influence in civic and human affairs, will raise this admirable profession to greater heights than ever in the public mind.—From *St. Louis Globe Democrat* of May 8.

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SIX YEARS OF FASCIST LEGISLATION

Measures Against the Counter-Revolution—Enactments Dealing with Social Insurance and Protection of Nation's Productive Forces — Italian Syndicalism Replaced — The Labor Charter—New Election Laws, etc.

By Joseph P. Bartilucci

Member of the Philadelphia Bar and of the Association's Comparative Law Bureau

EVENTS in Italy have succeeded each other with such telescoping speed, and these events have been of such fundamental nature as to tax the ability of one far more qualified and in closer touch with the events than my humble self who wishes to avoid any seeming advocacy of the Fascist changes and who desires only to draw a narrative picture thereof. A caution that must be borne in mind is that the time is not yet ripe for even an approximate criticism of the Fascist changes in Italy. Indeed, the present situation is but a transitory one, and the process is still far short of completion.

The reviewed period covers six years. It begins with the march on Rome in October, 1923, and closes with the dissolution of the Twenty-Seventh Italian Legislature on January 21st, 1929.

The whole period of six years of the Fascist Régime is replete with Legislation which meets the remarks of Mussolini, who, on May 26th, 1928, said: "It is necessary that our revolution take firm measures against the counter-revolution." However, this unusual Fascist revolution has proceeded with comparatively little violence, and has taken form rather through social, legal and political changes. Indeed, according to creditable sources the revolutionary changes of this new Régime have cost but 4,000 lives in the first five years of its existence, and can be well contrasted with the violence of the Russian Soviet revolution, which, according to reports of supposedly reliable Soviet figures, involved in two years 1,800,000 official executions. The drastic nature of some of the Fascist measures must be viewed as the product of this peaceful revolution, and can be best understood as the result of a determined effort to substitute a co-operation of all National economic forces for the unhappy class hatred advocated by Socialism.

Italy's current political and social achievements have been remarkable. They are a challenge to the established institutions of the present world. They invite comparison, regardless of local application. Even if they forbid adoption, the policy and Legislative record of the Fascist Régime, under the leadership of its great Duce, will amply repay close study, and, perhaps, point a solution to some of our own problems. Throughout its activities there is apparent the emphasis of labor and civil self-discipline, and of the proper regard for authority in family and state, which is held inconceivable without a proper regard for religious authority. No tolerance is shown ideas that undermine authority.

Even a most superficial review of the covered period of six years emphasizes the abundance of enactments dealing with social insurance, and with the protection of the productive forces of the Nation. Special consideration has been given the welfare of labor, offered, however, to them, not to allay discontent, but as a recognition of their economic and moral worth. National organizations of public nature have been established for the welfare of motherhood, and for the physical and moral education of the children. Rural life is promoted by education, and by social and agrarian measures.

Italian Syndicalism, which may be described roughly as including the recognized Associations of employees and independent workers and also of the employers, and a modern adaptation of the Guilds of the Middle Ages, has been replaced by a "Corporatism," which seeks through central connecting agencies to co-ordinate the activities of all the diverse syndicates, bringing together, for the general welfare, the workers and also their employers. The underlying thought has been fostered that political activity should be the expression of the economic forces of the Nation. Industry is stimulated, and the co-operation of all the National factors is opposed to the exclusive favor of any particular portion of society. Private property is rigorously sanctioned, but it takes on the aspect of a Public Trust. Only such Associations as recognize class interdependence are favored. The Unitary State is the Fascist ideal. Class domination is utterly discarded, and class warfare is considered unnecessary and is to be discouraged. It remains for the future to prove whether or not individual competition will suffer under the new policy.

Fascism has emphasized the need of individual adjustment to State needs. The Administration has been radically reformed, and a swollen bureaucracy has been materially reduced. A continuous stream of re-codification has modernized Laws that were utterly out of accord with the times. Executive power, evermore required in an age of increasing manifold activities, has made political centralization the order of the day.

Mention might well be made now of the historic settlement between Church and State, but it cannot be commented upon at this moment, although its significance is unquestioned. The Treaty is an instrument of 27 articles with the Pope recognized as a Sovereign Power. It is accompanied by the Concordat which solves the so-called "Roman Question" and consists of 45 articles. There is also a Financial Agreement of 3 articles. All these documents carry the date of February 11, 1929, but had to await the formal approval of parliament and the king. This Lateran treaty was unanimously approved by the House Deputies on

May 14, 1929 and ratified by the Senate on May 25th with only six opposing votes, and signed by the King on May 27th. On June 7th, at 11 A. M., the Pope and the Italian Government exchanged formal and final ratification of this treaty through Premier Mussolini and Cardinal Gasparri, thereby making a solemn end of a sixty year dispute and creating a new state to replace that which since September 20, 1870 had been made a part of the Italian Kingdom.

The Twenty-Seventh Italian Legislature, which first convened in April 1924, came to a close on December 8th, 1928, and was officially dissolved by the Royal Decree of January 21st, 1929, which Decree made provisions for a National Election fixed for March 24th, 1929, and for the formal convocation of the Twenty-Eighth Legislature, fixed for April 20th, 1929. On this memorable day was launched the new Corporate Form of Fascist Parliament, which will occupy the interest of the entire world. Memorable activities are predicted of it by Mussolini himself in his dissolution discourse of December 8th, 1928.

One of the products of the last Legislature was a most historic document entitled "The Labor Charter," promulgated April 21st, 1927, composed of 30 paragraphs, each of which contains a fundamental principle. And, as a logical sequence of the Labor Charter, and of the social Legislation concerning labor, arose the necessity of the Laws instituting the Corporations. (Act of April 3rd, 1926, and Decree July 1st, 1926). These Corporations comprehend all the associated factors of National production. The Fascist State with its corporate conception, values man's services in its productive value, but recognizes that his contribution is both manual and intellectual. Man's political privileges are made dependent upon his productivity, and are not a mere incident of having reached the legal age of maturity. These organized forces are recognized juridically by the Minister of Corporation, after fulfilling certain formalities, and include the liberal professions. Each Association, so recognized, must represent only one category of workers. Mixed Associations are not permitted, and there must be only one Association of members of a particular category for any one Territorial District.

In the Corporate State, all National activities, including the Syndicalist Organizations, have become a part of a new representative system, with its reform of National political representation.

It is to be borne in mind that the new Italian Parliament continues with two houses, a Senate and a House of Deputies. The idea of the Fascist Government is to transform the Lower House into a representative body of the organized productive forces of the Country, and to maintain the "Senato" as at present constituted. The reform of the Lower House has made it representative of the juridically recognized "Corporations," (or associations) distributed through both industry and agriculture, with an attempt to allot equal representation to the employers and to the employees. Recognition is also given the intellectual forces of society.

The new Election Laws (Decree September 2nd, 1928, and Decree January 17th, 1929, following the Act of May 17th, 1928) have discarded Party Government by Coalition Minorities. The number of National Deputies for the entire Realm has been limited to 400. These 400 candidates were offered in their entirety to the Italian electorate on March 24th, 1929, and the 9,650,370 voters were privileged to accept these candidates in their entirety or to reject them. To this end, the news dispatches described the printing of the necessary ballots; one half in the affirmative and the other half in the negative. The affirmative ballots were described as carrying the Italian colors; the negative ballots were all white. The elector chose his ballot in accordance with his wish to vote for or against the slate offered. Something like 89% of the total electorate went to the polls and of these only 136,198 voted negatively.

The slate of 400 was chosen by the "Gran Consiglio" of the Fascist Party from 1,000 submitted nominations. These nominations were divided into two groups of 800 and 200 each. Under the Royal Decree of September 2nd, 1928, the 800 nominations above mentioned were distributed among 13 classes of the National Confederations of legally recognized Syndicates, to each one of which was ascribed a fixed share thereof, in accordance with the table attached to the above mentioned Decree. The table follows:

1. National Confederation of Agricultural Employers....96
2. National Confederation of Agricultural Employees.....96
3. National Confederation of Industrial Employers.....80
4. National Confederation of Industrial Employees.....80
5. National Confederation of Merchants.....48
6. National Confederation of Employees of Merchants....48
7. National Confederation of those engaged in Marine and Air Transportation 40
8. National Confederation of those employed in Marine and Air Transportation.....40
9. National Confederation of those engaged in Land Transportation and Internal Navigation.....32
10. National Confederation of those employed in Land Transportation and Internal Navigation.....32
11. National Confederation of Bankers.....24
12. National Confederation of Bank Employees.....24
13. National Confederation of Arts and Professions.....160

The remaining 200 nominations above mentioned were distributed by the Decree of January 17, 1929, in accordance with Article 51 of the Decree of September 2nd, 1928, which permits such additional nominations by such Moral Entities and De-Facto Associations of National Importance as may be authorized by Royal Decree, and as were authorized by the above mentioned Decree of January 17th, 1929. In these nominations, 56 were permitted the Universities and Institutions of Higher Learning, and 75 were permitted organized ex-service men. And so the distribution continued through twenty-three classes of Moral Entities and De-Facto Associations selected by this Decree. The Official Count was conducted by the Court of Appeal at Rome, to whom the election returns were made through the local Pretori.

Had the slate of 400 candidates chosen by the Gran Consiglio failed to receive a majority of the votes cast, then a new election would have been directed by the Court of Appeals of Rome, and the Nation at large would have been allowed to choose its candidates in the following manner. Associations containing a membership of 50,000 registered voters, or more, would be permitted to submit a slate of candidates containing not more than three fourths of the entire number of delegates to be elected. Each such slate would carry an appropriate emblem and no candidate would appear upon more than one slate. The candidates appearing

upon the slate receiving the highest number of votes would be declared elected, and the number of successful candidates required to complete the prescribed 400 Delegates would be distributed among the other slates, according to the vote cast for them.

The Twenty-Seventh Italian Legislature, just dissolved, approved 2,057 Bills. Even Italian authorities hesitate at this moment to offer any review of this contribution. And your humble contributor dare hardly do more than suggest those which strike him as of most interest to his immediate readers, either because of their intrinsic worth or because they emphasize some similar problem of our own.

Among the Legislation that warrants mention may be included:

The substitution of the appointed Podesta for the local Mayor (Act February 4th, 1926, Lex 592).

The juridical recognition of Syndicalist Associations involving the discipline of labor, and the establishment of the Labor Judiciary (La Magistratura Del Lavoro—Act April 3rd, 1926, Lex 592—Act July 1st, 1926, Lex 1523).

The reform of Provincial Units and of their Administrative methods.

The establishment of the Voluntary Fascist Militia, and their incorporation as part of the National Army and the establishment of Special State Police (Milizie Speciali) for railroads, postal service, highways and forests, and the discontinuance of the Carabinieri forces.

The establishment of a Special Tribunal for crimes against the Nation and against the person of the King and of the Prime Minister.

The Law governing periodicals, restricting the freedom of the press.

The City of Rome was given a local government peculiar to itself. (Decree October 28th, 1925, Lex 1731.)

The inadequate Police Code of June, 1889, had to be redrafted and re-enacted—November 6th, 1926.

The original Constitution of 1848 made no mention of the Prime Minister, whose office developed with the establishment of the Italian Parliament, as a link between the Parliament and the Crown. His first Legislative recognition was in 1867, and finally in 1901 a Royal Decree determined the jurisdiction of the entire Cabinet and its members. The prestige of the Prime Minister was due largely to his individual strength, and following the World War the rapid fall and rise of the Cabinets became a National disgrace. This the Fascist Regime has sought to remedy by the Act of December 24th, 1925 and by the Act of January 31st, 1926. The Prime Minister is now called "Il Capo Del Governo." He is now the link between the individual Ministers and the King. Il Capo is appointed directly by the King, and his Cabinet is appointed or dismissed by the King but upon the proposal of Il Capo, which modifies the intent of Article 65 of the "Statuto." The duties of the Cabinet are to be established by Royal Decree upon proposal of Il Capo. The direction of seven Ministries have already been entrusted to him. Nothing can be offered in either of the Houses of Parliament without his approval.

Among other Laws passed was that fixing the right of the Executive to issue Rules having the binding force of Law. This form of Law is enacted in the form of Royal Decree, after having received Cabinet approval, and after consultation with the Counsel of State, and pertains to the execution of the Laws of the Land, and their interpretation. It also pertains to the organization and functioning of the Administrative machine, and thus deprives Parliament of this supervision, except insofar as Parliament controls the Annual Budget.

With these changes in the attributes and prerogatives of Il Capo Del Governo, the King remains the Head of the Government through his responsible Ministers, who, like our own American Cabinet, and unlike the other European institutions, remain responsible to the King and not to the Parliament. No vote of confidence can thus embarrass the King's Ministers.

The Prime Minister has been made Ex-Officio a member of the Regency Council, in the event of a minor ascending the throne.

A constitutional change of major importance is the establishment by the Act of December 9th, 1928, of the Grand Council of the Fascist Party as a Government Organ, for the co-ordination of all Governmental activities. This newly constitutionalized organ has deliberative functions, and it may be consulted in all matters specified by the act, appertaining, among other things, to succession to the throne, to the relations between the Church and the State, and to International Treaties that involve Territorial changes. It submits to the King the list of candidates for the Office of Prime Minister. Its membership is fixed by the Act, and its members are immune from arrest. Their services are gratuitous and its proceedings are secret.

One of the reforms closely followed by the Italian Premier, himself formerly a school teacher, was the re-organization of the public schools. This work is generally known as the "Gentile" reform, named after the Minister of Public Instruction. These changes supersede the old Law of 1859 and its fragmentary amendments, and the controlling thought is that the State shall provide school facilities only for those who prove themselves worthy, and to leave to private initiative the students not so qualified. Examinations under equal conditions are fixed for both public and private schools, over both of which the State maintains supervision. The elementary grades have two distinct purposes: One is that of preparation for the higher grades, and the other is a high type of broad popular education complete in itself.

The Royal Decree of February 5th, 1928, of 276 Articles, supersedes all previous Laws governing elementary education. It allows a subsidy for private schools meeting fixed standards.

During the year 1928 the Consular System was reorganized, bachelors were subjected to a personal tax which was applied to the support of foundling asylums, journalism came in for more regulation, a Commission was appointed to further survey administrative methods, excessive migration from rural districts was discouraged, and the Act of November 4th, 1928 completed the extension of all procedural laws throughout the newly acquired territories.

Linguistic Standards for Bench and Bar

"Under the Courts of Justice Act 1928 the possession of a competent knowledge of the Irish language will be necessary to every newly admitted barrister or solicitor seeking an appointment as an Assistant Justice of the District Court of the Free State; while a Bill now before the Dail seeks to enact that all future members of both branches of the legal profession shall possess a competent knowledge of the language."—*Canadian Bar Review* (Feb.).

TENTATIVE PROGRAM OF THE FIFTY-SECOND ANNUAL MEETING

Wednesday Morning, October 23, at 10 o'clock

Memphis Auditorium

Addresses of Welcome.

Annual Address by President of the Association.

Announcements.

Report of Secretary.

Report of Treasurer.

Report of Executive Committee.

State delegations will meet at the *close* of this session to nominate members of the General Council, and to select nominees for Vice-President and Local Council for each State.

Wednesday Afternoon, October 23, at 2:30 o'clock

Memphis Auditorium

Symposium—"Character Requirements for Admission to the Bar."

Speakers and subjects to be announced later.

Wednesday Evening, October 23, at 8:30 O'clock

Memphis Auditorium

Name of speaker and subject to be announced later.

10:00 P. M. President's Reception, Ball Room, Peabody Hotel.

Thursday Morning, October 24, at 10 O'clock

Ball Room, Peabody Hotel

Statement concerning the work of the American Law Institute.

REPORTS OF SECTIONS

(The names of the respective Chairmen are given.)

Comparative Law Bureau—William M. Smithers, Philadelphia, Pa.

Conference of Bar Association Delegates—James Grafton Rogers, Boulder, Colo.

Criminal Law—Justin Miller, Los Angeles, Calif.

Judicial Section—Arthur P. Rugg, Worcester, Mass.

Legal Education and Admissions to the Bar—William Draper Lewis, Philadelphia, Pa.

Mineral Law—Earle W. Evans, Wichita, Kansas.

Patent, Trade-Mark and Copyright Law—Henry M. Huxley, Chicago, Ill.

Public Utility Law—Joseph F. Jamison, St. Louis, Mo.

Uniform State Laws—Jesse A. Miller, Des Moines, Ia.

REPORTS OF COMMITTEES

Publicity—Walter H. Eckert, Chicago, Ill.

Membership—Richard Bentley, Chicago, Ill.

Memorials—William P. MacCracken, Jr., Chicago, Ill.

Adjournment.

Thursday Afternoon, October 24, at 2 o'clock

Ball Room, Peabody Hotel

REPORTS OF COMMITTEES

American Citizenship—F. Dumont Smith, Hutchinson, Kans.

Education of Aliens and Naturalization—William C. Kinkead, Cheyenne, Wyo.

International Law—James Brown Scott, Washington, D. C.

Removal of Government Liens on Real Estate. John T. Richards, Chicago, Ill.

Jurisprudence and Law Reform—Paul Howland, Cleveland, Ohio.

Federal Taxation—Hugh Satterlee, New York City.

Judicial Salaries—A. B. Andrews, Raleigh, N. C.

Admiralty and Maritime Law—T. Catesby Jones, New York City.

Commerce—Rush C. Butler, Chicago, Ill.

Commercial Law and Bankruptcy—Jacob M. Lashly, St. Louis, Mo.

Professional Ethics and Grievances—Thomas Francis Howe, Chicago, Ill.

Supplements to Canons of Professional Ethics—Charles A. Boston, New York City.

Thursday Evening, October 24, at 8:30 O'clock

Memphis Auditorium

Address by Dr. Walter C. Simons, Chief Justice, Supreme Court of Germany.

(Subject to be announced later.)

10 P. M. Plantation Scene and Chorus.

Friday Morning, October 25, at 10 O'clock

Ball Room, Peabody Hotel

REPORTS OF COMMITTEES

Publications—Alfred C. Intemann, New York City.

Division of Eighth Circuit—A. C. Paul, Minneapolis, Minn.

Uniform Judicial Procedure—Thomas W. Shelton, Norfolk, Va.

Insurance Law—William Brosmith, Hartford, Conn.

Legal Aid—Reginald Heber Smith, Boston, Mass.

Aeronautical Law—Chester W. Cuthell, New York City.

Radio Law—Louis G. Caldwell, Chicago, Ill.

Change of Date of Presidential Inauguration—Levi Cooke, Washington, D. C.

Noteworthy Changes in Statute Law—Joseph P. Chamberlain, New York City.

Nomination and Election of Officers.

Miscellaneous Business.

Adjournment sine die.

Friday Afternoon, October 25, at 2 O'clock

Automobile ride; Polo Game and Tea at Memphis Hunt and Polo Club.

Friday Evening, October 25, at 7 O'clock

Annual Dinner of members of the Association, ladies and guests at the Memphis Auditorium.

Saturday, October 26

All day boat trip as guests of the Bar Association of Tennessee and Memphis and Shelby County Bar Association.

(Continued on page 485)

SO THIS IS MEMPHIS!

Flags of Five Nations Have Flown Over Site of City Which Now Prepares to Welcome Coming of American Bar Members—Four Centuries of History Lend Colorful Background for the Historic City on the Chickasaw Bluffs—Many Points of Interest to Greet the Visitors

By Eugene Travis
Director of Publicity for Memphis Committee

HISTORY has built a theater with a panoramic background for the world's largest convention of lawyers—the American Bar Association and its 27,000 members—which meets in Memphis on October 23-25. It is in a veritable Potosi of romance, colorful legend and tradition and on a scene associated with the earliest explorations in America by the Spanish race. The story teems with major events in the march of civilization across the western continent. The trail picks up in DeSoto Park, fringing the South Side, over which tramped that intrepid explorer and gold-hunter, Fernando DeSoto, who blazed hundreds of miles through virgin wilds and weird country—and was the first white man to behold the "Father of Waters," the great Mississippi river.

Into the heart of the Chickasaw Nation, ruled by Chief Chisca, the immortal DeSoto led his band. That was in May, 1541, and DeSoto was given permission by the Indians to stay 28 days, until he could build barges to cross the river from the Chickasaw Bluffs. The Spanish explorer departed from the village on June 18, 1541, leaving the Chickasaws to be undisturbed thereafter for nearly two centuries.

That was 388 years ago, or 235 years before the first lawyer, Luke Bowyer, came to practice in the Tennessee country in 1776, and Isaac Rawlings sat as the first jurist on the bench at the Indian trading post, which became Memphis more than a century ago.

Attorney Bowyer was practicing law while Blackstone was delivering lectures to a class at Oxford, and long before his famous volumes appeared in 1769. He was a pugnacious attorney, the minutes of the Greene county court at the November term, 1786, would indicate. They run like this:

"Luke Bowyer fined five shillings for insulting the court. Fi. fa. issue for same. Luke Bowyer fined ten pounds for insulting the court and five shillings for profane swearing. Fi. fa. issue for same. Luke Bowyer ordered to be confined in the stock for one quarter of an hour; ditto one hour."

A hard-boiled judge a year later wrote this sentence in the record of the first court in the Tennessee country:

"Ordered that Elias Pybourn be confined in the publick Pillory one Hour. That he have both ears nailed to the Pillory and severed from his head; that he receive at the publick whipping post thirty-nine lashes well laid on, and his left cheek branded with the letter H, and his right cheek with the letter T, and that the sheriff of Washington county put this sentence in execution between the hours of Twelve and Two this day."

The initials in the branding punishment formed the abbreviation for "horse-thief."

The first instance of alleged feegrabbing was at the May term, 1788. The record says:

"Alexander McGintry, attorney for the State in this County, having for want of Act of Assembly crept into an error in taking two pounds instead of one pound, six shillings and eight pence, was by the Court freely pardoned on his own request."

The Acts of the General Assembly of North Carolina had not reached the western country then.

The first case tried by a "court of common pleas

Skyline of the Business District in Memphis, Tenn., Showing the Harbor on the Mississippi River. The tall structure in the background is the new twenty-nine story Sterick Building under construction.

and quarterly sessions" was that of Elijah Robertson versus Robert Sevier, for assault. The minutes show:

"Ordered that Robert Sevier be bound to his good behavior and enter into Recognizance with two securities in the sum of Ten Pounds himself (and five pounds each of his security) for his good Behavior for the Time and Term of Twelve Months."

The Robert Sevier thus put under bond to keep the peace died a hero on King's Mountain, w'.en shot down by Col. Patrick Ferguson's men. He was buried on Yellow Mountain, in the great Smokies.

It was along at this period, in 1788, at the May term, that Gen. Andrew Jackson made his début, and the minutes show:

"Andrew Jackson, Esq., came into court and produced a license as an attorney, with certificate sufficiently attested of his having taken the oaths necessary to the said office, and he was admitted to practice as an attorney of this County Court."

By coincidence, the entry was made by John Sevier, clerk, and the two became bitter political rivals for leadership in the years that followed.

Turning backward a century and more, in 1672, Louis Joliet, a French trader, and Pére Marquette, a Jesuit missionary, journeyed from Canada to the Chickasaw Bluffs in birch canoes. They claimed the Memphis territory for France as DeSoto had previously claimed it for Spain, and the pair established a trading post and mission.

Ten years later Sieur Robert Cavalier de LaSalle in his daring exploration of the Mississippi River visited the future site of Memphis. He was followed in 1739 by Jean Baptist Le Moyne de Bienville, distinguished soldier and colonial governor of Louisiana. Bienville sought valiantly to dislodge the Chickasaw Indians but finally left them in possession of their bluffs overlooking the "Father of Waters."

It was in November, 1762, that the French king by secret treaty ceded all his colonial possessions in America to Spain, which again made the Memphis territory a part of the Spanish province. On February 16, 1763, by terms of a general treaty of peace among Great Britain, France and Spain, the section including Memphis for the first time became a part of the dominion of the English Crown.

The country embracing Memphis was taken into the Union in June, 1796, as part of the State of Tennessee. Later the Spanish governor of Louisiana, General Gayoso, erected a fort called Fort Barances on the peninsula formed by the junction of Wolf River, in today's manufacturing district, and the Mississippi River, and sought to take possession of the territory which is now the city of Memphis. The Spanish troops abandoned the attempt on the arrival of Capt. Issac Guion, first American commander to assume control of the Chickasaw Bluffs. Captain Guion built Fort Adams, which rapidly grew to be an important trading post.

John Overton, who later became Chief Justice of the Supreme Court of Tennessee, bought 5,000 acres of land embracing the site of the future Memphis for $500. That was in 1818, or 111 years ago. The purchase was made from Elisha Rice. In turn Mr. Overton gave Gen. Andrew Jackson, his law partner, half of the 5,000 acres. The latter sold part of his gift to William Winchester and James Winchester, and the four men laid off the site of Memphis.

The Tennessee Legislature established Shelby county on November 24, 1819. It was named in honor of Gov. Isaac Shelby, of Kentucky, one of the heroes of King's Mountain in the Revolutionary War and who had in the previous year negotiated with the Chickasaw Indians for the purchase of their lands in Western Tennessee and Western Kentucky. That same Legislature established the Court of Pleas and Quarter Sessions, composed of William Irwine, chairman, and Andrew B. Carr, Marcus B. Winchester, Thomas D. Carter and Benjamin Willis. The court was organized in the open air on the top of the Chickasaw Bluffs, present site of the beautiful Confederate Park, in the downtown district. The court appropriated $125 to build a jail.

The city of Memphis was incorporated in December, 1826, or 103 years ago. A year later the first newspaper, the Memphis Advocate, appeared. In

An old mansion built more than seventy years ago on the historic Pigeon Roost road out from Memphis, Tenn. The builder was Pinckney Bethell, a wealth planter in the Delta in pioneer days. It was sold in later years to General Joe Wheeler, "Little Joe."

1854 the first steamboat line was put in operation between Memphis and New Orleans, and in 1857 the first train came in over the Memphis & Charleston railroad, "linking Memphis with the ocean" in South Carolina.

In 1861 a new flag floated on the bluffs which had in turn owed allegiance to the standards of Spain, France, England and the Stars and Stripes of the United States. Now it was the Stars and Bars of the Confederacy to which Memphis pledged fealty. Following a gunboat battle on the river in front of Memphis, which drew hundreds of men, women and children to the bluffs to see the "naval encounter," the Federal forces were victorious. Gen. William T. Sherman took command of the city.

A scene in historic DeSoto Park, Memphis, Tenn., showing a tablet erected to the memory of Fernando DeSoto, the first white man to see the Mississippi River.

During the Federal occupancy, Gen. Nathan Bedford Forrest, gallant Confederate cavalry leader, known as "the wizard of the saddle," made a daring night raid. He rode his horse into the Gayoso Hotel, headquarters of the Federal commanding officer. This is a favorite story with the few survivors of Forrest's cavalry command.

In DeSoto Park, near a great Indian mound built untold generations back, is a memorial, consisting of a ledge of rough granite with bronze tablets thereon, containing these inscriptions:

"Near this spot Hernando DeSoto discovered the Mississippi River in May, 1541.

"When first visited by the white man, this spot was the site of the fortress of Chisca, the chief of the Indian tribe which inhabited this region, and whose principal village stood a short distance eastward. The nearby eminences are mounds which were constructed by aboriginal inhabitants and are of unknown antiquity.

"The Chisca mound was utilized in 1863 during the Civil War as an artillery redoubt and magazine fortress, Fort Pickering, and the top of the mound was excavated for that purpose."

The slab was unveiled 10 years ago in the presence of Senor Don Emilio Zapico, special representative of their Majesties, King Alfonso and Queen Victoria.

Colorful days in the legal profession of Memphis followed the Civil War. They all came back as generals and colonels and captains, and some survive to this day. Three distinguished men of the Memphis and Shelby County Bar Association were born the same year—1851. They include Judge F. H. Heiskell, now on the bench of the Tennessee Court of Appeals; Judge James H. Malone, former mayor, and T. K. Riddick. Judge John P. Young, in his eightieth year, is retired, and Col. W. A. Collier, white-haired Confederate, still is a personage at the annual reunions of the remnant troops.

There is not, however, a survivor in Memphis who was a charter member of the Bar Association of Tennessee, organized December 14, 1881, and which met first in Memphis on July 1, 1886. The late Jacob M. Dickinson, former Secretary of War, was one of the charter members. The membership today is close to 1,500.

In a history of the bench and bar of Memphis, written more than forty years ago by O. F. Vedder, a newspaper man, he says:

"The history of America has no chapter on the origin of its laws. The pioneers who settled up the new territories and prepared them for states, were familiar with at least the elementary principles of the science of the common law. They carried this knowledge with them, and so soon as sufficient numbers had congregated, its machinery was easily put in motion.

"The common law adapted itself to the character and was shaped by the genius of the American people themselves. We see these observations verified by the early history of Shelby county. We might say the law was before there was law. So soon as a sufficient number had congregated on the Chickasaw Bluffs to need the protecting arm of the law and the establishment of tribunals of justice, and before there was any county or state, we find Isaac Rawlings presiding as justice, getting his commission from common consent and not of the state. His was the first judicial tribunal of which we have any account upon the Bluffs. His office was elective in the highest sense, but from the meager accounts we have of its administration, this had no weight with him. He seems to have been a man with strong native intellect, of unflinching courage, stern integrity, and sincerely desirous of adjudging rightly. True, he had the prejudices usual to narrow views and circumscribed personal association, but these seldom interfered, if ever, with the scale's balance. His jurisdiction was coex-

tensive with the settlement, and embraced both the rights of person and property.

"The cases of the first were usually petty thefts and assault and battery. The punishment was the whipping-post and banishment, and were meted out without delay, or the privilege of appeal or habeas corpus. The second was mostly possessory, and ample restitution was the decree of the court. The machinery was so simple there was scarcely need of the engineer, the lawyer, and we have no authentic account of any lawyer settling here until after the organization of the county of Shelby."

Landmarks of 75 years ago are here to this day. There is the first mansion, a mile beyond the city limits, on the Pigeon Roost road, the home of Pinckney Bethell, an immensely rich planter, who came here from Louisiana. And down at Washington boulevard still stands that ramshackle remnant, the antebellum home of Gen. Smith P. Bankhead, soldier, lawyer and editor.

A few hours' ride from Memphis is famous Reelfoot Lake, created by a weird subterranean disturbance 117 years ago—paradise of the Nimrod, favorite hunting retreat of Davy Crockett in another century. And just across the river from Memphis is beautiful Horseshoe Lake, finest fishing water and duck-hunting ground in the South.

Memphis today is the metropolis of three states —Arkansas, Mississippi and Tennessee. Recent annexation of environs has tilted its population above 250,000. Some of the finest motor highways in the country lead out of the city.

Its new Municipal Airport of 202 acres, comparing with the finest in the country, has just been dedicated in the presence of some 150 aviators, who flew to Memphis from all parts of the United States.

Known most widely for its pre-eminence in the world's markets of cotton and hardwood, Memphis, at the crossroads of the South, has an equal claim to reputation as a center of transportation and distribution and, among those who visit it, as a city of natural beauty with a system of parks and parkways few cities in the nation can surpass.

Memphis' location in its commanding position on the Chickasaw Bluffs, with its two bridges the only ones crossing the Mississippi south of the mouth of the Ohio, has been the biggest single factor in its progress. Not only has it contributed to business expansion, but it has also furnished the basis for the city plan of Memphis, which has grown and expanded with the river as its starting point, the business district along the river and the residential sections further to the east.

Uptown Memphis, along the river front, presents many points of interest to one who visits casually or as a convention delegate. At the head of Madison Avenue, where are most of Memphis' banks and principal office buildings, stands the custom house, overlooking the river and Mud Island, which forward-looking city planners have visioned as the city's front-door airport of the future. Next to the custom house is Confederate Park, overlooked by office buildings, where the Confederate forces held their position when federal gunboats attacked the city from the river. North and south are the offices of the many branches of the cotton trade and its allied industries which have had the primary part in making Memphis great as the largest inland cotton market in the world. Among them is the new twelve-story home of the Memphis Cotton Exchange.

East from the custom house one block is Main Street, once the business mecca of a town that has since expanded over block after block of a spacious yet compactly arranged loop district with tall buildings making a striking sky-line. North of the central axis is the Memphis Auditorium completed in 1924 at a cost of $2,000,000, and a structure almost unique in its class.

Twelve thousand seats there are in the great central hall of the building,—but this hall can be, and for most gatherings usually is, divided into two smaller halls, one seating 6,500 and the other 2,500 with a broad stage between. The north hall can be changed in an hour, by removal of its seats, to an exhibit hall, or to a ballroom. Once it has housed a circus. The south hall furnishes a compact theater. With both together, the stage is lowered on hydraulic pistons and added seating space there provided, with a small central platform for speakers, whose voices are taken by amplifiers to every corner of both halls. Beside these there is another exhibit hall, with 15,000 square feet of floor space, and more than a dozen smaller halls seating from 25 to 500.

Away from the business district one finds more in natural beauty. Riverside Park, on the south of the business district, shows one the city's most impressive views of the great river, in a setting of almost wild foliage cleared away only in the portion of the park where are the greens, tees and fairways of one of the city's three public golf courses. The South Parkway takes one from this park, around the city to the northeast, where is Overton Park, with another golf course, one of the nation's most complete free zoos, the Brooks Memorial Art Gallery, and the Doughboy Memorial statue, Memphis' tribute to her fallen ones in the late war.

Farther to the east there are Galloway Park, the newest of the public golf courses, and the country clubs. Memphis, Colonial, Chickasaw and Ridgeway offer their links to other followers of the ancient and honorable sport.

To him who makes motoring his sport, national highways unsurpassed in America radiate from Memphis to take him to his destination. The newly completed Memphis-to-Bristol route takes one on a 40-foot ribbon of concrete out of Memphis to the northeast, connecting at Nashville and Bristol with highways to the north and east.

North, the Jefferson Davis route takes one over newly completed concrete roads to the Kentucky line, there joining road systems of other states.

South, there are highways that lead to New Orleans and Birmingham and beyond. To the west, the great bridges, and the Harahan viaduct that spans the three miles of Mississippi floodlands between the river and the levee, take five national highways across the Mississippi. They radiate to Shreveport, Houston and Galveston, to Texarkana, Dallas and Forth Worth, to Little Rock, Oklahoma City and Tulsa, and more northerly routes to Kansas City and Denver, or to St. Louis and the Pacific Northwest.

There is, of course, industrial Memphis. There is the largest hardwood flooring plant in the world, that of the E. L. Bruce Company; the largest cot-

ton warehouse in the world, that of the Federal Compress and Warehouse Company; twelve of the country's largest cottonseed oil plants, an industry in which Memphis is the world's first producer; two of the south's largest automobile body plants; one of the largest golf club factories in America; one of the largest wheel spoke factories in America; river and rail terminals that handle every year a sufficiently great tonnage of tubular steel for the great oil country of the Southwest to make Memphis the largest non-producing distributor of iron and steel in the nation.

These are just a few hints of the industrial awakening that is taking place in the South of 1929, and in Memphis as nowhere else in the South. They may furnish to the visitor enough to make him want to seek for himself the things that most interest him in our city.

ARRANGEMENTS FOR MEMPHIS MEETING

TO be held at Memphis, Tennessee, October 23, 24, 25, 1929. HEADQUARTERS: Hotel Peabody, Union Avenue and Second Street.

Reservations and Hotel Information

Requests for reservations and information concerning the Peabody and other Memphis hotels should be addressed to the Executive Secretary, Olive G. Ricker, 209 South La Salle Street, Chicago, Illinois. **Space at the Peabody Hotel is exhausted.** Please specify other hotels in making request for reservation.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations stating (1) First and second choice of hotel (2) whether double or single room is wanted and if double the names of persons who will occupy it; (3) whether double or twin beds are preferred; (4) the approximate rate; (5) date of arrival, including definite information as to whether such arrival will be in the morning or evening.

Every effort will be made to comply with requests made. When requests cannot be complied with, the best available accommodations will be assigned. Reservations should be made as early as possible.

Railroad Transportation

Individual identification certificates will be sent, on request to the Executive Secretary, to all members of the Association who expect to attend the Annual Meeting, enabling them to secure a round-trip ticket at fare and one-half, return limit Oct. 31, or round-trip ticket good for thirty days at fare and three-fifths.

ADDITIONAL HOTEL ACCOMMODATIONS

HOTEL	Distance from Headquarters	Single	2 Persons—Double Bed	2 Persons—Twin Beds	Without Bath Single	Without Bath Double
Adler	3 Blocks	$2.00 to $2.50	$3.50 to $4.00	$4.00	$1.50	$2.50
Ambassador	5 Blocks	$2.00	3.50 to 4.00	4.00	1.50	$2.50 to $3.00
Catholic Club (for men)	5 Blocks				1.50 (Shower bath available)	$2.50
Chisca	3 Blocks	$2.50 to $5.00	4.50 to 5.50	$5.00 to $6.00	$2.00 to $2.50	$3.00 to $4.00
Claridge	6 Blocks	3.00 to 4.00	4.50 to 6.00	6.00 to 7.00		
Elk's (for men and women)	5 Blocks	2.00 to 3.50	4.00 to 6.00			
Gayoso	3 Blocks	250 to 5.00	4.50 to 7.50	5.00 to 7.50	2.00 to 2.50	3.50 to 4.00
Hermitage (for men)	1 Block		$3.00	$4.00	$1.00	
Tennessee	Across Street	2.00 to 3.00	$3.50 to $5.00	$5.00 to $6.00		
Forrest Park Apartments	1 Mile	Parlor, Bedroom, Bath and Kitchenette $4.00 to $6.00.				
Parkview Apartments	3 Miles	Parlor, Bedroom, Bath and Kitchenette $8.00 to $10.00. Parlor, Bedroom and Bath, Single $4.00, Double $6.00. Regular Hotel Reservations, $3.50 Single and $5.00 Double.				

THE TEACHING OF TRIAL PRACTICE

Trends Shown by Answers to Questionnaire on Methods of Teaching Subject Sent to Over One Hundred Law Schools—Suggestions of Ways and Means to Give Law Student Real Insight into Trial Practice—Difficulties to Be Met and Overcome

By Carl Wheaton
Professor in School of Law, St. Louis University

LAST October the writer sent to the professors teaching trial practice in one hundred and eleven law schools a questionnaire relating to the methods of teaching that subject. These included all of the schools in the Association of American Law Schools except the University of the Philippines College of Law, and, in addition, several non-association schools both in the United States and Canada. Sixty-two replies were received, coming from all parts of this country and from many of the large and better known schools, as well as from those which are smaller and less prominent. It is believed, therefore, that an accurate cross section of the manner in which trial practice is now taught in the United States and Canada can be gained from a study of the answers received, that certain trends can be established, and that, perhaps, some helpful suggestions may be obtained.

Let us briefly examine the trends as shown by the answers to the questionnaire. They consist of the predominance of practice courses; the comparative lack of the use of casebooks; the widespread study of particular state statutes; the frequent conduct of moot courts consisting of complete trials, as well as the preparation and filing, within a definite time, of necessary papers, and the hearing of preliminary motions before trial, the professor in charge usually acting as filing clerk and being the judge at all hearings, students taking the other roles; the employment of agreed statements of facts and facts obtained from actual cases as bases for trials; the use of classrooms or school courtrooms as the workshop; the holding of the trials publicly during class hours; the great variety of rules relating to the time within which the trial, or any part of it, must be complete; comparative inattention to appellate practice; little contact with law offices and courts.

Having made a general statement of the drifts in the teaching of practice, let us next address our attention to the relative worth of the different modes of procedure therein. That law students should at least be initiated into the underlying general principles of adjective law is unquestioned, not only by local, but by largely attended national, schools. There is, however, a definite difference of opinion as to the feasibility and value of moot courts.

In a day of crowded curricula and classrooms, this is a matter for serious contemplation. In some of the law schools whose facilities are overburdened, and in which hundreds, and even thousands, of students are crowded, whose enrollment consists of men and women from all parts of the country, any actual practice is thought to be impossible. It would be out of the question to train students in the practice of the various states from which they come; it would necessitate the employment of a large corps of practice teachers; funds would not be available, or, if they were, they could be spent to better advantage in some other way; practice can be learned more quickly than substantive law, its fundamentals and intricacies being mastered without a tutor much better than is the case with substantive law. In short, it will be to the advantage of the students and the public if such law schools spend at something else the time and money which would have to be devoted to trial practice, if any valuable results were to be gained from that work. There is a great deal to be said in favor of those arguments as they relate to that type of school.

And yet, there is another side to the story. Let us look at this obverse side. Admitting that it is true that procedural law is more easily and quickly mastered without a tutor than is substantive law, it is also a fact that it takes time to accomplish that mastery. And, in the meanwhile, the student is humiliated by his display of lack of knowledge, and his mistakes may cost his clients money which these seekers for legal aid should not have sacrificed on the altar of ignorance, and a further unhappy result of these errors may be a client lost. It will surely be granted that the ordinary student can, with instruction, become more rapidly proficient in adjective law than without it. Therefore, by the expenditure of a comparatively small amount of money and of but few hours of classroom instruction, both the public and the young attorney will save much that would be lost if the school from which he graduated had sent him forth almost, if not quite, uninformed concerning trial procedure. In large national schools, could not students from a particular state be grouped together for study of that state's practice? Could there not be some readjustment of time and funds so that no student would go forth as a graduate of any law school untutored in the mechanics of practice? Several of the larger schools have this in mind and are doing everything they feel they can to meet this dual need of their students and the public. As to the smaller, more nearly local schools, there seems to be little question that they should provide a thorough practice course. The only point in dispute should be the method to pursue.

When time permits, and it should be available,

the theory of practice should be studied. There are, on this subject, casebooks and texts by outstanding men.

Now, let us consider the trial itself. What of the sources of material from which to gain facts to use as a basis for the trial. Agreed statements of facts and actual cases are feasible. There is an interesting and instructive method which is used by a very well-known practice teacher. He gives the plaintiffs a skeleton statement of the nature of the claim to be sued upon. "The object," he says, "is to give direction to the problem, and to keep within fair limits. Within these very liberal limits plaintiffs are permitted to state such detailed facts as they think desirable. The remedy is not stated in the outline, frequently, but is to be chosen by the students, who frame their own pleadings." The writer has tried various methods. Of them, he has personally had the best results when the facts have been enacted before students, they, of course, not knowing that the situation was a dramatization. A stabbing affair, for instance, created excellent testimony. For cases not readily lending themselves to enactment, the use of abstracts has been found very helpful. These methods of obtaining fact bases for trials usually eliminate the introduction of fantastic evidence, tend toward keeping the evidence within reasonable bounds, and obviate all difficulty as to the division of witnesses.

Another mode of obtaining facts for trials has been suggested. It is to have actual litigants, whose cases have already been decided, try their cases over. This, ordinarily, would not seem practicable. It might be difficult to find people who would care to go through the process again, or at all, if the case had been settled out of court; it would probably be costly; it might stir up ill feeling between the former litigants.

The drafting and filing within a set time of pleadings and other necessary papers in the conduct of the trials is a valuable part of the work. It is sometimes difficult to impress the students with the idea that such documents must be filed within a definite period, especially since there is no effective method of enforcing the rule, as one wishes to proceed with the trial even though the students are remiss as to the prompt filing of the papers. Yet, if one explains to the students the fact that great inconvenience will be occasioned by delay and that in actual practice it will result injuriously to the dilatory attorney, fairly good results can be obtained.

In determining who should be selected as filing clerk, it would be well to consider whether or not this person should also be the trial clerk. If it is decided that he should act in that capacity, and this seems to be a reasonable procedure, then the frequent practice of appointing students as filing clerks is feasible, for it would seem out of place for a professor or school official to serve as clerk at the trial. In making such an appointment one needs to try to select a person who is careful and neat so that papers will not be lost, and in order that the records will be neatly kept. If the filing clerk is not to be the trial clerk, which practice seems to predominate, it is an advantage to have the papers filed with the professor in charge of the practice class, for he can then more easily keep track of the promptness or delay attending the filing of the papers than he can if anyone else acts in that capacity.

There can be little question but that preliminary motions, where necessary, should be heard. Ordinarily it is inconvenient to have them await a hearing at the trial, since time is then at such a premium. The result is that they will most often have to be made before someone at the school, even though an outsider is to preside at the trial.

Little need be said in relation to the source of supply of jurors and witnesses, except to state that it is well, when possible, to have the general student body of the university connected with the trial in these capacities, because this will result in their interest in the school. For the same reason it is also worth while, at times, to have outsiders act as witnesses. An added reason for this procedure often applies in relation to professional men, in that they can give interesting and valuable testimony which the student body cannot furnish.

As to those who act as judges, one may hope that some day there will be such co-operation between law schools and attorneys and courts that in the great majority of cases local judges, or, at any rate, local attorneys will fill those places. Not that the professor in charge of the practice course, who now most frequently acts as judge, is not highly efficient in that capacity, or that the local judge or attorney is extremely capable, but because an official or a stranger usually lends a certain dignity and reality to the occasion that is not otherwise obtained. That sometimes an alumnus acts as judge, especially if he is a member of a local court, is a splendid sign, and the practice should be encouraged. It will maintain the interest of the graduates in their schools, and will indicate that the school has not forgotten them.

Next we deal with the number of students who should be assigned as attorneys in a single trial. This will depend largely upon the number of trials for which time can be found, and the size of the classes. That four should be the number ordinarily chosen is usually necessary, because classes are large and the time delegated to actual trial work is limited. There is the advantage of co-operative work between counsel, and each can learn from the other. In the future, the number of attorneys in any single case will probably increase rather than decrease, but it seems that, where possible, a single attorney on each side is to be preferred, because, when the students get out into the practice, they will usually, especially in the beginning of their careers, have to prepare and try their cases without the aid of other counsel.

As to the place of holding trials, the best that can usually be done from the viewpoint of convenience is to provide a courtroom at the law school, for most of the trials must be held during the daytime, when local courtrooms would be in use. Such a school courtroom lends an atmosphere that is lacking in the ordinary classroom. Generally, both faculty and students pardonably speak of this "sanctum" with pride, and we are told that it contains all the paraphernalia of a regular courtroom.

Attention, however, should be called to the situation in one association school where there is such splendid co-operation between the school and the courts that trials are held during the day at the

courthouse, the local judge and other court officials acting in their usual capacities. This is admittedly unusual, and cannot often be expected. But we find thirteen day schools which hold their trials almost exclusively in the evening. Could not the city or county officials in the vicinity of these schools be interested sufficiently so that courtrooms at courthouses could be available for these trials? Could not the court officials be induced, at least occasionally, to offer their services? If courtrooms and court officials could be made available in the evening to schools now holding their trials during the daytime, would it not be a wise plan to try to hold more trials when they would be available? Where this plan has been tried out, it seems, ordinarily, to have been successful.

Although in some few instances the instructor with small classes is not pressed for time, yet, unfortunately, this time element does play a large part in the conduct of trial practice. The result is that almost every known method has been used to limit the time consumed in the introduction of evidence. When workable, it seems that the best method is to limit definitely the time within which evidence may be introduced. If the only rule is that the trial must be completed within a particular time, too much of it is consumed by the first witnesses. This is unfair to the opposing side, arguments must be unduly short, and not enough time is allowed for instructing a jury and returning a verdict. If the number of witnesses is limited, it may be very difficult to get in the necessary evidence by proper witnesses, and, even though this is not true, cross-examination of the limited number of witnesses may be too long. If one relies upon limiting the time according to the circumstances, he often cannot foresee them until the case is in progress, and then it is difficult, or unfair, to eliminate certain evidence. If the students know the time at their disposal before the trial and are given only a definite period for direct examination and cross-examination, they can prepare accordingly. By giving a comparatively short time for cross-examination much useless effort will be avoided and attention will be called to the value of extreme care in the use of cross-examination.

The same difficulty applies to the time to be devoted to argument, but to a less degree. If a proper division of time has been made in the preceding portions of the trial there will be adequate time left for arguments. Attention should be called to the fact that in several jurisdictions there are court rules as to the limitation of arguments. In such instances, it is wise to follow them as closely as circumstances permit.

Probably there is but little controversy as to the advisability of teaching appellate practice. It should be done. But where shall we find time to do it thoroughly? Until the general opinion changes as to the relative time to be spent in the study of adjective and substantive law, there will be great difficulty in finding a place in curricula for an adequate treatment of appellate practice. That there should be that change, especially in local law schools, the writer does not doubt. Certainly no student should leave such a school without a fairly clear idea of the methods of taking a case to an appellate court and carrying the procedure through to completion. Moreover, he should know something of the methods of the enforcement of judgments. But literally hundreds, perhaps thousands, of each new crop of attorneys enter the practice with practically no information concerning these matters.

Though the usual type of practice court may be of tremendous value, there is a question as to whether there is not something of even greater worth which should at least be connected with the trial practice course. Reference is made to the laboratories to be found in law offices, both those of the usual type and such organizations as Legal Aid Bureaus. There are many obstacles. At the very threshold, there is the difficulty of getting such offices and organizations to open their doors, even half way, to the schools and their students. They say that to have a newly graduated student in the office is bad enough. They cannot trust him with their clients' work; they have not time to instruct him, or to go over his work after it is done. That is the usual attitude. One association law school has, on the other hand, been very successful in operating a legal clinic in connection with its law school.[1] Difficulty in obtaining entrance into the Legal Aid Bureau involved was obviated because the bureau was organized by the dean of the law school.

The wisdom of this move on his part has been long since proved. The law school has a very close connection with this clinic, not only because of its genesis, but because it helps to pay the salary of the lawyer in charge of it, and practically determines who he shall be. A large enough salary is paid so that a good man may be obtained. In addition, a first-class practice man at the law school prepares the students for the work at the clinic, and keeps in close touch with the lawyer at the Legal Aid Bureau. This seems almost, if not quite, an ideal situation. The men get an idea of office management and practice, as well as of court work. There is someone available who can, and who will, check over the work of the student, at the same time having him do his own research originally.

But there are very few schools so fortunately situated, circumstances not having shaped themselves, or been shaped, so favorably. For those other schools which believe in a legal clinic, in addition to, or in place of, trial practice, what is to be done? Either by some method of persuasion and of education as to the needs of the law schools and as to the duty of the law fraternity to provide those needs, entrance must be gained to the good law offices, Legal Aid Bureaus, or similar bodies, run by attorneys who are willing to help students by giving them valuable work to do and who are ready to correct them in that work; or laws must be passed requiring apprenticeships as is done in portions, at least, of Canada and some few states; or the law schools must establish and run their own clinics. None of these possibilities are easy of accomplishment. It takes years to educate people to new ideas, and lawyers are no exception. If the high grade law offices and the organizations mentioned above are to become, in part, legal clinics for law students, they must, to be of the greatest worth, co-operate with the law school in-

1. The annals of the American Academy of Political Science, Vol. 124, Mar. 1926, pp. 136-144; Cherry, "Legal Clinic," American Law School Review, May, 1921.

volved in relation to the assignment and to the prosecution of the work, and records must be kept of the manner in which it is done. The student should be allowed to study office management, interview clients, draft papers of various types, make searches for law, work up evidence, attend court, prepare abstracts and both trial and appellate briefs. He should be taught the proper methods of procedure in the clerk's office and should become familiar with the records there. In short, he should be initiated into as many of the intricacies of practice as possible and not merely be an office boy. The passing of laws demanding articling of law students to attorneys is a slow process, and, after it is done, there is a question as to any real worth in the ordinary case. There is, again, difficulty of getting the better attorneys to article students. The result is that students will drift into less desirable connections where they will gain little legal information, and the law will create a situation resulting in a mere formality. Under such a régime it might be more difficult to obtain co-operation between the lawyers and the schools than if, through education and persuasion, the lawyers were induced to take students into their offices. The last mentioned alternative of the creation and running of a legal clinic by the school has its own particular obstacles. Perhaps the first barrier to surmount is the getting of raw material. If a school starts out with none in hand, it is going to cost time and money to work up a clientele. If that is to be gotten forthwith by the purchase of a practice, if one of value from the viewpoint of material on which to work is available, it will cost more money but take less time than to wait for a practice to grow. Another method to pursue is, if possible, to employ a practicing attorney with a good supply of cases of various types to work with the school by allowing a practice teacher to have an office in the practicing attorney's suite, and to allow the instructor to have the students work on the attorney's cases under the instructor, who should be a person with whom the attorney would trust his cases. This would probably be very expensive. In the final analysis, therefore, though the difficulties may be many, unless the attorneys ungrudgingly open their doors to the students and work wholeheartedly with the law schools, the best proposition appears to be the conducting of legal clinics by the schools. The original money expenditure need not be great, as the school buildings could house the necessary offices, no extra clerical help need be furnished to begin with, and office supplies would not be costly. If necessary, one can wait for the accumu'ation of a practice. Let those who believe in this kind of a move catch a vision of the splendid workshop that would, in a few years, develop in which students could follow cases from their beginnings through courts of appeal. Let them be heartened by the knowledge that this thing has been done.

To many, the legal clinic may seem a dream of the distant future for most schools. They may be right. In the meanwhile, let us exert our best facilities for giving to the law students a real insight into trial practice. Let us ground them well in its theories; let us give them all contact possible with courts by visiting trials with them, by having them appointed as receivers, commissioners, and the like, when that can done; and, finally, when reasonably possible, let us conduct thorough trial and appellate court practice.

QUESTIONNAIRE ON THE MANNER OF CONDUCTING TRIAL PRACTICE

1. Do you have a single course in trial practice, or do you divide the work into different courses?
2. Do you use a case book?
3. Do you make a study of the practice statutes of any particular state?
4. Do you conduct a moot court?
5. If you do, of what does it consist, trials or merely arguments?
6. If you have trials,

(a) From what sources do you obtain the facts upon which you base them, i. e., agreed sets of facts, actual disputes between parties, etc.

(b) Do you have the students acting as attorneys prepare pleadings, motions, and any other papers? If so, do you set any particular time within which they must be prepared? Must they be filed? If that is required, with whom are they filed?

(c) Are preliminary motions made and heard before trial? If so, before whom is that done?

(d) Who act as judges, jurors, witnesses, and court officers?

(e) How many students do you assign to act as attorneys in a single case?

(f) Where do you hold the trials?

(g) Are they held during the day or in the evening?

(h) Are they open to the public?

(i) Do you limit the time within which evidence may be introduced or arguments made? If so, what is the limit?

7. Do you have any appellate work? If so, of what does it consist?
8. Do you place students in law offices? If so, what is your method of obtaining opportunities to make the placements? Is this part of your work connected with any agency, such as a Legal Aid Bureau?
9. Does anyone connected with your school accompany groups of students to courts to watch trials therein?
10. Are there any other items of interest connected with your trial practice work? If so, kindly outline them.

Tentative Program of Fifty-Second Annual Meeting

(Continued from page 476)

Conference of Bar Association Delegates to Meet on Oct. 21

The Conference of Bar Association Delegates will meet at Memphis on Monday, October *21st*, instead of on Tuesday as has been the custom hitherto. The growing program of the Bar Association and the increasing importance of its section meetings now require that practically a full week be devoted to the annual business of the Association. The Conference of Bar Delegates is the principal means of contact and understanding between the national body and the numerous state and local associations and a full day will be given to its deliberations, with probably both a luncheon and dinner meeting devoted to the less formal side of its activities. The committees of the Conference, which are dealing with the rule-making power, the form of State Bar organization, the relations between press and bar, and other like subjects, and a new committee which is studying and co-ordinating the investigations of the evils of ambulance chasing in a number of large cities, will occupy a part of the day. The delegates from various state and local associations will also be called upon to report the events of their own associations.

AMERICAN BAR ASSOCIATION JOVRNAL

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Journal Office: Room 1119, The Rookery Bldg.,
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NAPOLEON AT WORK ON THE CRIMINAL CODE

In an article in this issue Judge Pierre Crabitès of the Mixed Tribunals of Egypt, gives some definite and extremely interesting details of the nature and extent of Napoleon's participation in the making of the French Criminal Code. He has gone to the minutes of the Commission that compiled the Code and brought from them the man's own words.

The first result is to dispel any impression that Napoleon was a negligible factor in the actual work, that he was a mere formal and occasional presiding officer, or that he availed himself of his dignity and prestige to secure the acceptance of his ideas without opposition. On the contrary, he was quite willing to discuss matters, to listen to argument, to yield the point. Simplicity and directness are the characteristics of all he said.

There is a striking note of modernity in his attitude at times. For instance, they were discussing the jury—apparently on theoretical grounds. Napoleon inquired, in substance, "but how does the jury actually function these days?" In other words, he wanted the facts as a basis for action. Similar questions are being asked today by any number of legal research bodies. How things are working out, in actual practice, instead of how they ought, or have long been supposed, to work out is the object of their quest.

His attitude toward the judiciary, brought out in this same discussion, is likewise surprising. He regarded the judges as a main bulwark against tyranny. He no doubt had in mind the old "Parlement" of Paris and, perhaps, some recollection of English political history. "A tyrannical government," he said, "would much rather have criminal justice administered by jurors than by judges. The latter are not under his thumb. They have invariably vigorously opposed an encroaching executive. History shows that the most relentless and terrible of tribunals have invariably been made up of juries. If these courts, which have left a trail of blood in their wake, had been composed of judges, judicial customs and rules of procedure would have been a rampart against unjust and arbitrary condemnations."

Napoleon had not heard of the American Law Institute or perhaps of official legislative draftsmen, but he anticipated their opinions perfectly. "Choose one or the other of these two systems," he said; "if neither suits you, work out a new plan. But let it be clear. It must not be obscure." That was, of course, a typical Gallic attitude. The cult of clarity is the secret of French style and explains in part why that language was so long the predominant medium of diplomacy and international affairs.

These details do not detract from Napoleon's genius. They rather give a better idea of what is genius in the world of affairs. If it is not, as some one has said, "an infinite capacity for taking pains," it is at least a capacity to understand and rely on facts as the basis of opinion. The poet, as Shelley has said, may be "the hierophant of unapprehended inspirations." But the lawmaker and the statesman must not only apprehend their inspirations but also have a very definite idea of whence they come and what they are worth.

MEN AND MACHINERY

President Hoover has rendered real service to the movement to maintain the high standards of the judiciary, and to improve its personnel where necessary, by his attitude on the selection of federal judges. He has stressed, in no uncertain manner, the necessity of paying strict attention to the character and qualifications of those who are chosen. The advice of those who are in the best position to judge is to be asked. Letter-writing campaigns and the various devices to create an impression of popular or professional demand are to be appraised at their true worth. The names

of those who are backing the applicants for nomination are to be made public.

In his address at the banquet of the American Law Institute, Attorney General William D. Mitchell again formulated the official attitude on this important matter. "Tonight I want to say to you," he said, "that one of the things that this administration is most earnest about is to see to it that the men who are selected for posts on the Federal bench shall be men of integrity and ability and in every way qualified for these posts. One of the inspiring things to me has been, since I have undertaken to participate in this work, to find that President Hoover responds instantly to any effort or assistance that is made or given to aid him in procuring for these positions the men who are qualified from every point of view. Some of this responsibility rests with you. We need advice and assistance. We have to write you for it. It is your duty to give us your candid judgment about these things."

It is the constant tendency of a democracy to assume that the machinery of government, judicial or otherwise, will work infallibly, and that almost anyone will do to work it. This assumption of the competency of almost anybody for any and every job is, of course, flattering to its self-esteem. But there is no more dangerous fallacy in the political field and the consequences of following it in the selection of judges by the elective process are often painfully evident. President Hoover has done his part to remind the public in state and nation that the men who are to work the machinery are fully as important as the machinery itself.

THE RIGHTS OF BOOKS

The Library Committee of the Association of the Bar of the City of New York has found it necessary to send a circular note to members calling attention to specific mutilations of law books by tearing out pages and asking their aid in discovering the perpetrators of these acts. Doubtless committees of other associations have been confronted with similar situations.

Certainly few things more contemptible than such vandalism could be imagined. The act is a fair index to the character of the perpetrator. Lack of consideration for for rights of others, willingness to destroy property without compensation, and the furtive method of the petty thief, are all quite plainly shown. Undoubtedly the number of such persons is small, but the damage they can do to a library is extremely large.

The mutilators of books are unfortunately not confined to this small group. There are many fairly respectable persons who sin through carelessness and ignorance. Turning down leaves at frequent intervals, so that the appearance of the page is forever marred, drawing lines along the margins of books to impress a casual passage on the mind, and leaving them there, underlining phrases that catch the eye, "breaking the backs" of books by careless handling—these are only a few of the ways in which the rights of books to a long life and decent appearance are violated.

AN IMPRESSIVE SHOWING

An official of a certain institute which is preparing a volume dealing with current research in the law and related fields writes the Journal that in the work of preparation "our attention was repeatedly called to the large number of groups of lawyers who, in their organized capacity as lawyers, were engaged in studying and investigating ways of improving the administration of Justice.

"Besides the numerous sections and standing committees of the American Bar Association there are, operating in this country," he continues, "nineteen Crime Commissions bearing that formal title and six other groups performing the functions of Crime Commissions. There are, in the United States, eleven state judicial councils and one federal judicial council. To this list should be added the National Association of Legal Aid Organizations and the many local bodies represented in this Association. There should be added also the numerous state bar associations, both incorporated and non-incorporated, numerous committees of which are engaged in activities looking toward law reform."

He concludes with this very pertinent and true observation: "The foregoing incomplete list of the organizations of lawyers engaged in improving and perfecting the law is a most impressive showing when set over against the common statement that lawyers are indifferent to law reform or the statement that if law is to be improved laymen must do it."

REVIEW OF RECENT SUPREME COURT DECISIONS

Where Interim Adjournment of Congress Prevents Return of Unapproved Bill by President Within Ten Days the Measure Does Not Become Law—Court of Customs Appeals Not Limited in Jurisdiction as Are Constitutional Courts—Jurisdiction Over Appeal from Board of Tax Appeals—Senate's Power to Investigate Election of Senator Elect and to Compel Attendance of Witnesses—"Shadowing Juror" Held Contempt of Court — Refusal to Answer Senate Committee's Question Held Contempt

By Edgar Bronson Tolman*

Constitutional Law—Statutes—"Pocket Veto"

Where an interim adjournment of a House of Congress prevents the return of an unapproved bill to it by the President within ten days, such bill does not become a law, notwithstanding the failure to return it.

Okanogan Tribe et al. v. United States, Adv. Op. 503; Sup. Ct. Rep. Vol. 49, p. 463.

The validity of the so-called "pocket-veto" was presented for determination in this case. The petitioners sought to recover certain claims under the terms of a bill passed by both Houses of Congress. The bill was presented to the President on June 24th, 1926. Congress thereafter adjourned its first session on July 3, under a house concurrent resolution. Its next session commenced the following December. Neither House was in session the tenth day (Sundays excepted) after presentation of the bill to the President.

The bill was not signed or returned to the Senate by the President, nor was it published as a law.

The clause of the Constitution relating to the passage and approval of bills provides that

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections to the other House, by which it shall likewise be reconsidered: and if approved by two-thirds of that House, it shall become a Law.
>
> . . . *If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.*

The Court of Claims sustained a demurrer to the petition brought pursuant to the bill. The Supreme Court then granted certiorari and affirmed the decision in an opinion delivered by Mr. Justice Sanford. He stated the issue involved in these terms:

> The specific question here presented is whether, within the meaning of the last sentence—which we have italicized—Congress by the adjournment on July 3 prevented the President from returning the bill within ten days, Sundays excepted, after it had been presented to him. If the adjournment did not prevent him from returning the bill within the prescribed time, it became a law without his signature; but, if the adjournment prevented him so doing, it did not become a law. This is unquestioned.

The petitioners urged the following points: (1) That an adjournment preventing return of a bill means final adjournment terminating the legislative existence of Congress; (2) That an adjournment of a session does not prevent return, since the President can return a bill to the secretary, clerk or other appropriate agent of the Houses; and (3) that "ten days" means "legislative days"—i. e. days while Congress is sitting, not calendar days.

These points were considered separately in the opinion, and finally rejected by the Court. In support of the first point the argument made was that the Constitution gives the President merely a qualified negative over legislation, by returning and stating his objections to a bill so that congress may reconsider it, not a silent and "absolute" veto. This was thought not persuasive, however, for the following reasons:

> This argument involves a misconception of the reciprocal rights and duties of the President and of Congress and of the situation resulting from an adjournment of Congress which prevents the President from returning a bill with his objections within the specified time. This is illustrated in the use of the term "pocket veto," which does not accurately describe the situation, and is misleading in its implications in that it suggests that the failure of the bill in such case is necessarily due to disapproval of the President and the intentional withholding of the bill from reconsideration. The Constitution in giving the President a qualified negative over legislation—commonly called a veto—entrusts him with an authority and imposes upon him an obligation that are of the highest importance, in the execution of which it is made his duty not only to sign bills that he approves in order that they may become law, but to return bills that he disapproves, with his objections, in order that they may be reconsidered by Congress. The faithful and effective exercise of this momentous duty necessarily requires time in which the President may carefully examine and consider a bill and determine, after due deliberation, whether he should approve or disapprove it, and if he disapproves it, formulate his objections for the consideration of Congress. To that end a specified time is given, after the bill has been presented to him, in which he may examine its provisions and either approve it or return it, not approved, for reconsideration. . . . The power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly. And it is just as essential a part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress, as it is that Congress, on its part, should have an opportunity to re-pass the bill over his objections. . . .
>
> And it is plain that when the adjournment of Congress prevents the return of a bill within the allotted time, the failure of the bill to become a law cannot properly be ascribed to the disapproval of the President—who presumably would have returned it before the adjournment if there had been sufficient time in which to complete his consideration and take such action—but is attributable solely to the action of Congress in adjourning before the

*Assisted by Mr. James L. Homire.

time allowed the President for returning the bill had expired.

No justification was found for construing "days" to mean "legislative days" and none for holding that "adjournment" means "final adjournment."

The Court then adverted to the crucial question whether an interim adjournment prevents the return of a bill just as effectively as a final adjournment. In this connection the Court first expressed its view that the term "House" as used in the clause in question means the House in session, sitting in an organized capacity for the transaction of business. The suggestion that return might be made to an agent of the particular House was thought unsound.

> The House, not having been in session when the bill was delivered to the officer or agent, could neither have received the bill and objections at that time, nor have entered the objections upon its journal, nor have proceeded to reconsider the bill, as the Constitution requires; and there is nothing in the Constitution which authorizes either House to make a *nunc pro tunc* record of the return of a bill as of a date on which it had not, in fact, been returned. Manifestly it was not intended that, instead of returning the bill to the House itself, as required by the constitutional provision, the President should be authorized to deliver it during an adjournment of the House, to some individual officer or agent not authorized to make any legislative record of its delivery, who should hold it in his own hands for days, weeks or perhaps months,—not only leaving open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all, but keeping the bill in the meantime in a state of suspended animation until the House resumes its sittings, with no certain knowledge on the part of the public as to whether it had or had not been seasonably delivered, and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid. In short, it was plainly the object of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its reconsideration; and that the return of the bill should be an actual and public return to the House itself, and not a fictitious return by a delivery of the bill to some individual which could be given a retroactive effect at a later date when the time for the return of the bill to the House had expired.

It was also observed that only one attempt appears to have been made in Congress authorizing the return of a bill to a House while not in session. It failed and has never been renewed.

Emphasis was also placed on the long-continued practical construction of the provision by many Presidents and the acquiescence of Congress in that construction in support of the Court's conclusion in the matter.

> Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character. . . . [Here cases are referred to] in which the court said that a practice of at least twenty years duration "on the part of the executive department acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning."

The case was argued by Mr. William S. Lewis for the petitioners, and by Attorney General Mitchell for the United States, and by Mr. Hatton W. Sumners as amicus curiae.

Courts—Jurisdiction of Legislative Court—Court of Customs Appeals

The Court of Customs Appeals is a legislative court not limited in jurisdiction to cases or controversies as are constitutional courts established under Article III S. 2 of the Constitution.

A writ of prohibition will not lie to prohibit its hearing an appeal from findings of the Tariff Commission.

Ex Parte Bakelite Corporation, Adv. Op. 490; Sup. St. Rep. Vol. 49, p. 411.

The petitioner here sought a writ of prohibition from the Supreme Court to prohibit the Court of Customs Appeals from hearing an appeal from findings of the Tariff Commission.

The Tariff Act empowers the President to deal with unfair importation practices, when satisfied that the same exist, by increasing the duty, or in extreme cases, by excluding from entry articles to which the practices relate.

To assist the President in performing this function the Tariff Commission is directed to investigate allegations of unfair practices, make findings and recommendations for the President for consideration and action. The party against whom findings are made is granted the right to appeal to the Court of Customs Appeals on questions of law and to apply for certiorari to the Supreme Court for further review.

The petitioner here, Bakelite Corporation, obtained from the Commission findings of unfair practices and a recommendation excluding certain articles from entry. The importers appealed to the Court of Customs Appeals, which held that it had jurisdiction. The petitioner then petitioned for a writ of prohibition, but the writ was denied by the Supreme Court in an opinion by MR. JUSTICE VAN DEVANTER.

The position of the petitioner was stated in the two propositions following:

> 1. That the Court of Customs Appeals is an inferior court created by Congress under section 1 of Article III of the Constitution, and as such it can have no jurisdiction of any proceeding which is not a case or controversy within the meaning of section 2 of the same Article.
>
> 2. That the proceeding presented by the appeal from the Tariff Commission is not a case or controversy in the sense of that section, but is merely an advisory proceeding in aid of executive action.

The Customs Court sustained the first proposition, but rejected the second. In the Supreme Court counsel argued the power of that Court to issue a writ of prohibition as well as the two propositions stated. But since the Court took the view that the Customs Court is a legislative court not bound by section 2, Article III, the question of power to issue the writ was left open.

The distinction between constitutional and legislative courts was then adverted to.

> While Article III of the Constitution declares, in section 1, that the judicial power of the United States shall be vested in one Supreme Court and in "such inferior courts as the Congress may from time to time ordain and establish," and prescribes, in section 2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers

and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.

The difference between such courts was first recognized, apparently, by CHIEF JUSTICE MARSHALL in *American Insurance Company v. Canter,* where territorial courts were held to be legislative rather than constitutional tribunals.

Similarly classified have been the courts created for the District of Columbia, the United States Court for China, consular courts, the Court of Claims, and the Choctaw and Chickasaw Citizenship Court. Following a discussion of these courts MR. JUSTICE VAN DEVANTER said:

> Before we turn to the status of the Court of Customs Appeals it will be helpful to refer briefly to the Customs Court. Formerly it was the Board of General Appraisers. Congress assumed to make the board a court by changing its name. There was no change in powers, duties or personnel. The board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and in liquidating and collecting customs duties. But its functions, although mostly quasijudicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times.
>
> The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.
>
> This summary of the court's province as a special tribunal of the matters subjected to its revisory authority, and of its relation to the executive administration of the customs laws, shows very plainly that it is a legislative and not a constitutional court.

In support of the petitioner's position the argument was advanced that the intention of Congress that the Customs Court is a constitutional court appears from the fact that it made no provision respecting the tenure of its judges, contrary to the usual practice of limiting the tenure in the case of legislative courts.

> The argument is fallacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred.

The case was argued by Mr. Samuel Richardson for the petitioner, by Solicitor General Mitchell for judges of the Court of Customs Appeals and by Mr. Meyer Kraushaar for Frischer and Co. et al.

Courts—Constitutional Courts—Jurisdiction Over Appeal from Board of Tax Appeals—Income Tax—Liability for Payment by Third Party

A petition to a Circuit Court of Appeals to review a decision of the Board of Tax Appeals presents a case or controversy within the jurisdiction of a constitutional court of the United States.

Payments made by an employer pursuant to an agreement in satisfaction of the income taxes imposed on an employee's salary constitute additional income in respect of which the employee is taxable.

Old Colony Trust Co. v. Commissioner of Internal Revenue, Adv. Op. 581; Sup. Ct. Rep. Vol. 49, p. 499.

The taxpayer here, the executor of the will of William M. Wood, resisted the payment of an income tax deficiency adjudged to be due by the Board of Tax Appeals in respect of additional income taxable against Wood during his life-time. Wood had been president of the American Woolen Company. It had voted to pay all income taxes assessable against the salaries which it paid its officers. The disputed question here was whether the amounts paid by the company in payment of taxes against the officers constituted taxable income.

After the Board of Tax Appeals had decided against the taxpayer, it appealed to the Circuit Court of Appeals pursuant to a provision in the Revenue Act of 1926, which amended the Act of 1924. That Court certified to the Supreme Court the following question:

> "Did the payment by the employer of the income taxes assessable against the employee constitute additional taxable income to such employee?"

Before answering the question certified, the Court, in an opinion by the CHIEF JUSTICE, discussed an objection to its jurisdiction. That objection was that the appeal to the Circuit Court did not constitute a case or controversy cognizable in a constitutional court. To dispose of this it became necessary to consider the function and status of the Board.

It had been created by the Revenue Act of 1924. That Act did not provide for a judicial review of the Board's decision, but left the parties free to proceed in any court of competent jurisdiction to test the correctness of the Board's decision. The Act of 1926, however, provided for direct judicial review of the Board's action by filing a petition in a Circuit Court of Appeals.

Before explaining fully the procedure and function of the Board, the Court discussed the meaning of case and controversy, citing the language quoted in *Muskrat v. United States,* where the Court had said:

> "The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter; and includes only suits of a civil nature. Chisholm v. Georgia, 2 Dall. 431, 432; 1 Tuch. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

The following explanation of the Board's action then appears in the opinion:

> In the case we have here, there are adverse parties. The United States or its authorized official sues to establish its right to the payment by a taxpayer of a tax due from him to the Government, and the taxpayer is resisting that payment or is seeking to recover what he has already paid as taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise of judicial power. The courts are either the Circuit Court of Appeals or the District of Columbia Court of Appeals. The subject matter

of the controversy is the amount of the tax claimed to be due or refundable and its validity, and the judgment to be rendered is a judicial judgment. . . .

It is next suggested that there is no adequate finality provided in respect to the action of these courts. In the first place, it is not necessary, in order to constitute a judicial judgment that there should be both a determination of the rights of the litigants and also power to issue formal execution to carry the judgment into effect, in the way that judgments for money or for the possession of land usually are enforced. A judgment is sometimes regarded as properly enforceable through the executive departments instead of through an award of execution by this Court, where the effect of the judgment is to establish the duty of the department to enforce it.

Other provisions of the Act of 1926 were summarized leading to this conclusion:

The complete purpose of Congress to provide a final adjudication in such proceedings, binding all the parties, is manifest and demonstrates the unsoundness of the objection.

A further difficulty appeared in the appeal in the instant case, however, because it had arisen under the Act of 1924 and was pending undecided when the Act of 1926 was passed. With respect to such an appeal the later statute did not prevent the bringing of suit after the taxpayer had adopted the procedure of appealing to the Board or to the Circuit Court of Appeals, but apparently permits him to pay the tax and sue for a refund. The principles of *res judicata* were invoked to relieve the difficulties involved in this duplication of procedure or remedy:

The truth seems to be that in making provision to render conclusive judgments on petitions for review in the Circuit Courts of Appeals, Congress was not willing in cases where the Board of Tax Appeals had not decided the issue before the passage of the Act of 1926, to cut off the taxpayer from paying the tax and suing for a refund in the proper Distric. Court. But the apparent conflict in such cases can be easily resolved by the use of the principles of *res judicata*. If both remedies are pursued, the one in a District Court for refund, and the other on a petition for review in the Circuit Court of Appeals, the judgment which is first rendered will then put an end to the questions involved and in effect make all proceedings in the other court of no avail. Whichever judgment is first in time is necessarily final to the extent to which it becomes a judgment. There is no reason, therefore, in the case before us to decline to take jurisdiction.

As to the merits of the case the Court took the view that the taxpayer is not relieved of taxation on the additional sum paid to the Government in satisfaction of the tax.

The payment of the tax by the employers was in consideration of the services rendered by the employee and was a gain derived by the employee from his labor. The form of the payment is expressly declared to make no difference (Section 213, Revenue Act of 1918, c. 18, 40 Stat. 1065). It is therefore immaterial that the taxes were directly paid over to the Government. The discharge by a third person of an obligation to him is equivalent to receipt by the person taxed. The certificate shows that the taxes were imposed upon the employee, that the taxes were actually paid by him and that the employee entered upon his duties in the years in question under the express agreement that his income taxes would be paid by his employer. This is evidenced by the terms of the resolution passed August 3, 1916, more than one year prior to the year in which the taxes were imposed. The taxes were paid upon a valuable consideration, namely, the services rendered by the employee and as part of the compensation therefor. We think therefore that the payment constituted income to the employee.

A contention that the payment of the tax by the employer is a gift was rejected.

It was also urged that the government's theory, if pressed to a logical conclusion, would lead to the absurdity of a tax on a tax *ad infinitum*. This was disposed of by pointing out that the government has never taken that position as a practical matter, and in any case the question did not require adjudication here.

A question, analogous on the merits, was presented in *United States v. Boston & Maine Railroad* which involved the taxability, as income, of money paid by the lessee of a railroad in satisfaction of income taxes imposed on the lessor in respect of rentals. Such payments were held to constitute taxable income of the lessor.

MR. JUSTICE MCREYNOLDS dissented on the jurisdictional question in the *Old Colony Trust Co.* case.

The case was argued by Mr. Arthur A. Ballantine for the taxpayer and by Special Assistant to the Attorney General Alfred A. Wheat for the United States.

Congress—Jurisdiction Over Election of Members—Power to Compel Attendance of Witnesses

Warrant of arrest may issue to bring a witness before the Senate to answer pertinent questions propounded by it in an inquiry properly made by it, even though a subpoena has not been first issued and served on such witness.

The Senate lawfully may investigate the election of a Senator-elect who has not been formally admitted to that body by taking the oath of office.

In such an investigation witnesses may be compelled to attend by warrant of arrest.

Barry v. United States ex rel. Cunningham, Adv. Op. 526; Sup. Ct. Rep. Vol. 49, p. 452.

The Court here considered questions growing out of an inquiry instituted by the Senate respecting the validity of the election of William S. Vare as Senator from Pennsylvania. A special committee was created, and before the election it subpoenaed Cunningham to answer questions regarding the primary election in Pennsylvania. He stated that he had supported Vare; that he had given $50,000 to the chairman of Vare's organization, but refused to say where he got the money. His salary was $8,000 a year, and he had never inherited any money, but would not say whether he had made money in speculation.

After Vare's election the special committee made a partial report of Cunningham's refusal to testify. Later, when Vare's election was contested, the committee was authorized to preserve evidence relating to charges of fraud and unlawful practices in the election. Cunningham was recalled and the questions previously put were asked again, but he again refused to answer.

The committee afterwards reported Cunningham's conduct to the Senate and recommended that he be adjudged in contempt. The Senate, however, did not follow this recommendation, but passed a resolution reciting the contumacy of Cunningham and ordering his arrest and that he be brought before the bar of the Senate,

"To answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate, may propound, and to keep the said Thomas W. Cunningham in custody to await further order of the Senate."

After his arrest as directed, he brought a writ of habeas corpus for his release, alleging that he had been illegally arrested for refusal to disclose his private and personal affairs to the committee, and had been illegally adjudged in contempt. A return to the writ denied that he had been adjudged in contempt and asserted that the warrant required merely that he be brought to answer the questions pertaining to the matter under inquiry.

The district court held that there had been no

adjudication of contempt, but merely a proper arrest to appear and answer pertinent questions. The Circuit Court of Appeals by a divided court, held that the arrest was in reality for contempt, but even if merely to require answer to proper questions it was void because no subpoena had been first issued and served.

On certiorari the Supreme Court upheld the view of the district court in an opinion delivered by MR. JUSTICE SUTHERLAND. He said:

> It results that the following are the sole questions here for determination: (1) whether the Senate was engaged in an inquiry which it had constitutional power to make; (2) if so, whether that body had power to bring Cunningham to its bar as a witness by means of a warrant of arrest; and (3) whether as a necessary prerequisite to the issue of such warrant of arrest a subpoena should first have been served and disobeyed.

As to the first question the Court pointed out that the Constitution confers upon the Senate certain judicial power, including the power to judge the election returns, and qualifications of its members: that to perform this function facts must be ascertained.

> In exercising this power, the Senate may, of course, devolve upon a committee of its members the authority to investigate and report; and this is the general, if not the uniform, practice. When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate. But undoubtedly, the Senate, if it so determine, may in whole or in part dispense with the services of a committee and itself take testimony; and, after conferring authority upon its committee, the senate, for any reason satisfactory to it and at any stage of the proceeding, may resume charge of the inquiry and conduct it to a conclusion or to such extent as it may see fit. In that event, the limitations put upon the committee obviously do not control the Senate; but that body may deal with the matter, without regard to these limitations, subject only to the restraints imposed by or found in the implications of the Constitution. We cannot assume, in advance of Cunningham's interrogation at the bar of the Senate, that these restraints will not faithfully be observed. **It sufficiently appears from the foregoing that the inquiry** in which the Senate was engaged, and in respect of which it required the arrest and production of Cunningham, was within its constitutional authority.

The contention that the Senate had jurisdiction over its "members" and not over unadmitted senators-elect was summarily rejected.

> When a candidate is elected to either House, he of course is elected a member of the body; and when that body determines, upon presentation of his credentials, without first giving him his seat, that the election is void, there would seem to be no real substance in a claim that the election of a "member" has not been adjudged. To hold otherwise would be to interpret the word "member" with a strictness in no way required by the obvious purpose of the constitutional provision, or necessary to its effective enforcement in accordance with such purpose, which, so far as the present case is concerned, was to vest the Senate with authority to exclude persons asserting membership, who either had not been elected or, what amounts to the same thing, had been elected by resort to fraud, bribery, corruption, or other sinister methods having the effect of vitiating the election.

Nor was any importance attached to the argument that refusal to admit Vare operated to deprive the state of equal representation in the Senate in violation of Article V. It was pointed out that that provision constitutes a limit on the scope of constitutional amendment, not on the power of exclusion or expulsion of a Senator.

No doubt was entertained as to the Senate's power to issue a warrant of arrest for the production of a witness. That power, fully upheld in *McGrain v. Daugherty* with reference to the exercise of a legislative function, was thought to apply equally or *a fortiori* to the exercise of a judicial function.

The question finally considered was the necessity for issuing a subpoena before issuing the warrant of arrest. As to this it was conceded that the practice very generally is to issue a subpoena and not to order an arrest until the subpoena is disobeyed. But authority was not lacking to support the practice here followed.

> The comment of the court in *Crosby v. Potts*, 8 Ga. App. 463, 468, is peculiarly apposite.
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> "It is a hardship upon one whose only connection with a case is that he happens to know some material fact in relation thereto that he should be taken into control by the court and held in the custody of the jailer unless he gives bond (which, from poverty, he may be unable to give), conditioned that he will appear and testify; but the exigencies of particular instances do often require just such stringent methods in order to compel the performance of the duty of the witness's appearing and testifying. There are many cases in which an ordinary subpoena would prove inadequate to secure the presence of the witness at the trial. The danger of punishment for contempt on account of a refusal to appear is sometimes too slight to deter the witness from absenting himself; especially is this true where there are but few ties to hold the witness in the jurisdiction where the trial is to be held, and there are reasons why he desires not to testify; for when once he has crossed the State line, he is beyond the grasp of any of the court's processes to bring him to the trial or to punish him for his refusal to answer to a subpoena. We conclude, therefore, that since the law manifestly intends that the courts shall have adequate power to compel the performance of the respective duties falling on those connected in any wise with the case, it may, where the exigencies so require, cause a witness to be held in custody, and in jail if need be, unless he gives reasonable bail for his appearance at the trial."

The opinion was concluded with the following:

> It is not necessary to determine whether the information sought was pertinent to the inquiry before the committee, the scope of which was fixed by the provisions of the Senate resolution. But it might well have been pertinent in an inquiry conducted by the Senate itself, exercising the full, original and unqualified power conferred by the Constitution. If the Senate thought so, and, from the facts before it reasonably believing that this or other important evidence otherwise might be lost, issued its warrant of arrest, it is not for the court to say that in doing so the Senate abused its discretion. The presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority. It fairly may be assumed that the Senate will deal with the witness in accordance with well-settled rules and discharge him from custody upon proper assurance, by recognizance or otherwise, that he will appear for interrogation when required. This is all he could properly demand of a court under similar circumstances.
>
> Here the question under consideration concerns the exercise by the Senate of an indubitable power; and if judicial interference can be successfully invoked it can only be upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law. That condition we are unable to find in the present case.

The case was argued by Mr. George W. Wickersham for the petitioners and by Mr. Ruby R. Vale for the respondents.

Contempt—Obstruction of Justice—"Shadowing" Jury

Shadowing a jury constitutes contempt of court under the Act of March 2, 1831, even though the jurors are not shown to be aware thereof, and even though no contact is made with any of them or corrupt influence exercised.

Sinclair et al v. United States, Adv. Op. 569; Sup. Ct. Rep. Vol. 49, p. 471.

The appellants here had been adjudged guilty of contempt by the Supreme Court of the District of

Columbia. The proceeding was instituted by petition of the United States for an order requiring the appellants to show cause why they should not be punished for contempt.

The substance of the petition was that in the trial of Sinclair and Fall for conspiracy to defraud, the appellants unlawfully employed numerous detectives and operatives to shadow, watch and spy upon the jurors at all times while they were outside the court room, to impede the jurors, to influence the jurors corruptly, and to bring about a mistrial of the cause; that the operatives investigated the encumbrances on the home of one juror, made investigation concerning the father and brother of another and the neighbors of a third; that the operatives procured and presented to the judge a false affidavit that one juror, Glasscock, was seen in conference with a United States attorney, and that a mistrial was had in the case.

The appellants resisted the charges on the ground that there was no purpose alleged to establish "contact" with jurors, or that any contact with jurors was established, or any purpose to exercise an improper influence. They (except William J. Burns) admitted employment of the detectives and operatives and asserted their legal right so to do without contact. They also alleged that the practice of having jurors under surveillance was followed widely by the Department of Justice.

William J. Burns denied that he had any connection with employment of the detectives and denied that he had been involved improperly in procuring the false affidavit concerning Glasscock. No evidence sufficient to show guilt was in the record as to him, and the Supreme Court reversed his conviction.

On conviction Sherman Burns was fined $1000; Sinclair sentenced to six months' imprisonment; Day four months, and William J. Burns fifteen days. On appeal to the Court of Appeals, questions were certified to the Supreme Court. The latter ordered up the whole record and affirmed the judgment as to all appellants except William J. Burns. MR. JUSTICE MCREYNOLDS delivered the opinion of the court, summarizing the evidence as follows:

> The evidence does not disclose that any operative was instructed to approach, or did approach a juror, nor does it disclose that any juror actually knew that he was being shadowed. Some were suspicious. The Court did not know, nor does it appear that Sinclair's counsel knew, the jury was being shadowed.

A statute of 1831 provides that

> "the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

Objection to the sufficiency of the petition was disposed of with the following comment:

> Counsel maintain that the petition does not adequately charge and the record fails to show misbehavior by appellants which obstructed the administration of justice within Sec. 268, Judicial Code, since there is neither averment nor evidence that any operative actually approached or communicated with a juror, or attempted so to do, or that any juror was conscious of observation. The insistence is that to establish misbehavior within that section it was essential to show some act both known by a juror and probably sufficient to influence his mind. We cannot accept this view. It would destroy the power of courts adequately to protect themselves—to enforce their right of self-preservation. Suppose, for example, some litigant should endeavor to shoot a juror while sitting in the box during progress of the cause. He might escape punishment for contempt if some quick-witted attendant quietly thwarted the effort and kept the circumstances secret until the trial ended.

After stating that the proper criterion for determining the offense is the reasonable tendency of the acts rather than their actual effect the Court said:

> That the acts here disclosed, and for which three of the appellants were certainly responsible, tended to obstruct the honest and fair adminstration of justice we cannot doubt. The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law. The most exemplary resent having their footsteps dogged by private detectives. All know that men who accept such employment commonly lack fine scruples, often wilfully misrepresent innocent conduct and manufacture charges. The mere suspicion that he, his family, and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration. If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable juries, in important cases, probably would become an impossibility. The mistrial of November 2nd indicates what would often happen. We can discover no reason for emasculating the power of courts to protect themselves against this odious thing.
>
> The acts complained of were sufficiently near the court. Most of them were within the court room, near the door of the court house, or within the city. . . . There was probable interference with an appendage of the court while in actual operation; the inevitable tendency was toward evil, the destruction, indeed, of trial by jury. . . .

The opinion was concluded with a brief discussion of the propriety of rejecting evidence of the alleged practice of the Department in shadowing jurors. Under the circumstances no abuse of discretion was found on the part of the trial court.

During the hearing and before conviction of guilt counsel proffered many witnesses by whom they proposed to show a practice of the Department of Justice to cause its officers to shadow jurors. This evidence was rightly excluded. That Department is not a lawmaker and mistakes or violations of law by it give no license for wrongful conduct by others.

The case was argued by Messrs. George P. Hoover and Martin W. Littleton for Sinclair; by Messrs. Daniel Thew Wright and Philip Ershler for Day; by Mr. Charles A. Douglas for William J. and Sherman Burns, and by Mr. Owen J. Roberts for the United States.

United States Senate—Contempt of—Jurisdiction to Conduct Investigations

Refusal to answer a question of a Congressional committee pertinent to a matter forming the proper subject of investigation by a House of Congress constitutes contempt punishable under R. S. §102.

The fact that Congress has directed the institution of court proceedings in connection with the matter under investigation does not impair its jurisdiction to make investigation as to legislative aspects thereof.

Sinclair v. United States, Adv. Op. 324; Sup. Ct. Rep. Vol. 49, p. 268.

The Court here considered the conviction of Harry F. Sinclair for which a jail sentence of three months and a fine of $500 was imposed. The charge against him was that he had violated R. S. §102, U.

S. C. Tit. 2 §192, which makes it a misdemeanor for a witness before a Congressional committee to refuse "to answer any question pertinent to the question under inquiry."

The indictment set forth the circumstance leading up to the offense charged. Briefly summarized they are as follows: The government was interested in conserving petroleum for naval vessels, particularly that in public lands. To effect proper conservation, an executive order was made pursuant to statute requiring that areas designated Naval Petroleum Reserves 1, 2 and 3 be held for exclusive use of the navy. In 1920 a statute was enacted directing the Secretary of the Navy to take possession of properties in the naval reserves "on which there are no pending claims or applications for permits or leases" under the act of 1920 "or pending applications for United States patents" to conserve and develop the same by contract, lease or otherwise, and to use, store, exchange or sell the products for the United States. Provision was made preserving the rights of claimants under leases.

Thereafter, Sinclair procured a lease to be made to the Mammoth Oil Company and contracts with its subsidiaries affecting the Naval Reserves. These transactions came to attention of the Senate, and a charge was made that there had been fraud and bad faith in the making of them. Questions arose as to their legality and as to the future policy of the government relating to such leases, and the desirability of other legislation. Appropriate resolutions were adopted by the Senate directing that the whole subject be investigated.

Sinclair was called and appeared as a witness before the committee investigating the matter. Senator Walsh asked him a question to elicit information as to a contract with one Bonfils touching Teapot Dome. The indictment charged that Sinclair knew that this question referred to a contract under which Mammoth Oil Company was to pay $250,000 to Bonfils and one Stack for the release of rights in lands which the company had leased from the government.

Sinclair refused to answer and gave as his reason for refusal that Congress by joint resolution (Senate Resolution 54) had ordered legal proceedings for cancelation of the lease and contracts involved and appropriate criminal prosecutions. He stated, however, that he did not desire to invoke protection against self-incrimination, and that there was nothing incriminating to disclose. He urged that Congress, having committed the matter to the courts had made it a judicial question, and thereby had exhausted its power over it, saying finally:

> "I shall reserve any evidence I may be able to give for those courts to which you and your colleagues have deliberately referred all questions of which you had any jurisdiction and shall respectfully decline to answer any questions propounded by your committee."

On appeal to the District of Columbia Court of Appeals questions were certified to the Supreme Court. It required the whole record to be sent to it, and subsequently affirmed the conviction in an opinion delivered by MR. JUSTICE BUTLER.

The legal points urged by Sinclair in respect of the indictment and proceedings were summarized in the opinion in the following statement:

> Appellant contends that his demurrer to the several counts of the indictment should have been sustained and that a verdict of not guilty should have been directed. To support that contention he argues that the questions related to his private affairs and to matters cognizable only in the courts wherein they were pending, and that the committee avowedly had departed from any inquiry in aid of legislation.
>
> He maintains that there was no proof of any authorized inquiry by the committee or that he was legally summoned or sworn or that the questions propounded were pertinent to any inquiry it was authorized to make, and that because of such failure he was entitled to have a verdict directed in his favor.
>
> He insists that the court erred in holding that the question of pertinency was one of law for the court and in not submitting it to the jury and also erred in excluding evidence offered to sustain his refusal to answer.

In disposing of the points urged the Court first reviewed numerous authorities upholding the privilege of individuals generally to be free from investigations into their private affairs, and emphasizing the importance of that privilege. That general privilege was thought to afford no protection here.

> While appellant caused the Mammoth Oil Company to be organized and owned all its shares, the transaction purporting to lease to it the lands within the reserve cannot be said to be merely or principally the personal or private affair of appellant. It was a matter of concern to the United States. The title to valuable government lands was involved. The validity of the lease and the means by which it had been obtained under existing law were subjects that properly might be investigated in order to determine what if any legislation was necessary or desirable in order to recover the leased lands or to safeguard other parts of the public domain.
>
> Neither Senate Joint Resolution 54 nor the action taken under it operated to divest the Senate or the committee of power further to investigate the actual administration of the land laws. It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.
>
> The record does not sustain appellant's contention that the investigation was avowedly not in aid of legislation. He relies on the refusal of the committee to pass the motion directing that the inquiry should not relate to controversies pending in court and the statement of one of the members that there was nothing else to examine appellant about. But these are not enough to show that the committee intended to depart from the purpose to ascertain whether additional legislation might be advisable. It is plain that investigation of the matters involved in suits brought or to be commenced under Senate Joint Resolution 54 might directly aid in respect of legislative action.

The pertinency of the question to a proper investigation was also asserted:

> Congress, in addition to its general legislative power over the public domain, had all the powers of a proprietor and was authorized to deal with it as a private individual may deal with lands owned by him. . . . The committee's authority to investigate extended to matters affecting the interest of the United States as owner as well as to those having relation to the legislative function. . . .
>
> The question propounded was within the authorization of the committee and the legitimate scope of investigation to enable the Senate to determine whether the the powers granted to or assumed by the Secretary of the Interior and the Secretary of the Navy should be withdrawn, limited, or allowed to remain unchanged.

The ruling of the trial court that the pertinency of the question was for determination by the court rather than the jury was sustained on analogy to the rule in perjury cases relating to relevancy and materiality. Nor was any error found in the trial court's exclusion of testimony to the effect that the refusal to answer was in good faith and on advice of counsel.

> The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and §102 made it appellant's duty to

(Continued on page 504)

IMPORTANCE OF MAINTAINING THE DIGNITY OF THE PROFESSION OF THE LAW

By Henry Upson Sims
Member of the Birmingham Bar

PRIMITIVE localized society, whether in Chaldea, China, Egypt, Greece, Rome or Mediaeval Europe, was always divided into two main classes, the masters and the toilers. The masters ruled: the toilers served, worked the soil, and produced the wherewithal to support the entire population.

The masters gradually subclassified themselves into patriarchs, archrulers or kings, and underlords or noblemen. The cause determining the selection is immaterial. It may have been the family unit or clan impulse, it may have been divine choice, it may have been individual strength or force. But, however the order came about, there were always rulers and subrulers, and without them there was no localized society.

What with the time it required to rule successfully, and the disinclination to work engendered in the mind of rulers as the result of ruling, we can picture society becoming more and more crystallized into classes who wanted to rule more and more widely and classes who were driven to labor harder and harder to support the load. Hence came wars for the aggrandisement of the respective rulers and the development of many more sub-rulers classified and trained for carrying on war.

The art of war would seem to be the mother of the professions. A profession is a human activity permissible in a stratified society, which is above menial service and the cultivation of the soil, and which requires such special training or skill as to demand the greater part of the time of those engaged in it. Fighting was probably the first social activity which was seen to warrant this amount of training. So the soldiers were doubtless the first professional men. And as good fighting was nearly a prerequisite of protracted ruling, it was quite natural for those born to rule to be trained as good fighters, and for good fighters to be selected as rulers. So history seems to support us in the assumption that well down to the period of organized society those who ruled and those who pursued the profession of arms were almost entirely the same class.

The fact that feudal systems have appeared and flourished in different parts of the world is a remarkable proof of the innate necessity of such human relations at certain stages of social development.

There was, however, one other profession which followed close after the profession of arms. Next to mankind's craving for individual power, is his fear of power greater than his own. And whether we dignify this fear as religion or call it superstition, or awe of the supernatural, mankind's reverence for the gods soon formed the basis for the recognition of an occupation for certain members of society, justifying as complete devotion of their time as did the pursuit of arms. So the profession of priesthood early came to be recognized as a pursuit quite as absorbing as the profession of arms.

These two professions long satisfied the tendencies of society towards specialization. The early social developments of China, Egypt, Greece, and Rome were too far in the past for us to recall their phenomena clearly enough to talk about them. But we can all recall our history of mediaeval Europe with sufficient clearness to enable us to agree that the two professions of arms and the church divided between them, well down to modern times, pretty well the entire field of needed professionalism. The feudal kings and lords, as a corollary of their ruling, administered justice and made part of the laws, and the church as an incident to its moral authority made the rest of them. Moreover, the higher soldiers worked out such engineering as was done, and the monks provided the literature, science, and fine arts.

The truth is that society did very well without further professionalism. And an intensely interesting fact is that the two professions maintained themselves with the highest degree of dignity, both toward the lower classes and toward each other.

But in the meanwhile trade had extended from Italy and the South into Northern Europe. The Flemish and Dutch merchants were approaching the period which was, relatively to other nations, that of their greatest glory. Under the Valois kings in France and the Norman and Plantagenet kings in England merchandising had so grown in importance that the business customs of Paris and London, and even of the lesser centers, had to be recognized by kings as supporting rights between large classes of their subjects. Interests in land had already become so multiform that the King was unable any longer to sit in his own person alone as the administrator of justice. Henry the Second in England had begun appointing especially learned persons to sit as judges in his stead. And with the growth of trade and especially with the growth of the royal revenues incident thereto, courts of various jurisdictions arose to which specialists in administration had to give the greater part of their time.

The judges performed a strictly royal function; and it was but a short advance from the duty of administering justice to the rise of a class equally specialized in the law who could represent the litigants and aid the court in establishing the right of a cause. The profession of law in the English courts arose sometime during the reign of Henry the Second. But it already existed under the jurisdiction of the courts of the Church. So it was not remarkable that once the crown courts had been created, the profession of common law lawyers should arise to aid justice in those courts, just as a class of lawyers had long existed, though prob-

ably not in England, to aid in procuring justice in the courts of the Church of Rome.

So the profession of the law has a royal heritage; and however its origin may have become obscured by time, it is easy not only to trace its source to government, but also to prove that its existence is necessary to the successful administration of government from the formative period of social organization down to today. All the other professions which develop in the wake of the law may be also necessary to modern society; but it cannot be claimed for any of them that they are essential phases of organized government itself.

Nevertheless, nothwithstanding the origin of the profession of the law and its essentiality to organized government, the profession cannot function effectively unless its importance and dignity are kept prominently before the masses.

The importance of this fact cannot be too positively emphasized. While the courts are actually separate from the bar, the personnel of the judges is chosen from the bar. And while the legislatures and the law administering bureaus are composed of others besides lawyers, the complexion of both the statutes and the decisions of the courts and bureaus is greatly affected by the practicing lawyers. So if the profession of the law is not most highly respected, it must shortly follow as the night the day that the courts, the administrative bureaus, and the legislatures will lose the respect and confidence of the public.

Commerce and Industry are more prominent fields of endeavor in America today than are any of the professions. And the magnification of commercial success in the last decade or so has produced a terrible strain upon the fundamental principles of society. Henry Ford is quoted as having said recently that success consists in finding something which everybody wants, and making or furnishing it cheaper than others have been doing so. That was a highly valuable observation, which will doubtless stimulate many men and women to make more efficient the types of mind which God has given them. But high moral effort and high intellectual effort are not likely to be produced that way; and high moral and intellectual effort are necessary in the best type of lawyers, the type of which the bar must be chiefly composed in order to preserve the historical effectiveness of the profession.

It is not by any means the wealth alone, coming to successful industrialists, which has so magnified them before the eyes of the country. But individually acquired wealth is probably the chief index of commercial and industrial success. And lawyers generally have not been able and will not be able to acquire conspicuous wealth in the pursuit of their profession. A knowledge of the law or the practice of it, must be the chief object of their efforts. So other marks of distinction than wealth must be discovered to preserve for the Bar dignity and social importance.

Of course the economic situation of the Bar would be considerably improved if the number of lawyers could be reduced. There are too many lawyers today for the amount of legal business nearly everywhere in America; and the normal result of excess of supply as compared to demand, has kept fees of lawyers low and elaborate living by lawyers rare. If the public can be made to understand that the social principle underlying the guilds of the later Middle Ages and the English Inns of Court, can be justifiably applied to the Bar, the number of lawyers will be reduced in the next generation.

But aside from the cooperation of the legislatures in effecting the reduction in future of our numbers, there is no help to be gotten toward raising the dignity of the Bar from outside the profession. There are no patents of nobility for the lawyers in America, as there are in England. The Bar must depend then upon itself to meet the peril of the situation. It must arouse the respect of the public by its own efforts at upbuilding. It must aspire to a position of leadership, deserve such a position, and maintain it. And to that end it must maintain the highest respect for itself.

But as yet the Bar does not seem to realize the peril of the situation. Although an absolutely necessary factor in society, born to power, and fitted by education for leadership, we are not developing our own organization to justify a position of leadership. We seem to lack vision. We must improve our class-consciousness. While other professions are becoming better organized to support their duties and privileges in a developing society, the bar is nearly everywhere losing ground.

Let us recall how the doctors, how the preachers, how the realtors have succeeded in organizing themselves into unified national bodies of which the membership in regions, States, and localities are so completely correlated as parts of the whole that the opinion of each locality is transmissible through representatives to larger and larger groups, advancing step by step until it is felt in the expressed opinion of the national gatherings. Then let us realize how much farther the legal profession in America has to develop its esprit de corps before the State organizations and the national organization can be so correlated.

Our professional meetings are but aggregations of individuals, whose collective expression represents merely the personal opinions of those present and voting. We rarely secure a truly representative meeting of our local professional assemblies; and the American Bar Association assemblies, while in the highest and broadest sense representative of the American bar, are in only a very limited sense meetings of representatives of the local bars of the several States. We have been unable so far to organize ourselves sufficiently to take charge of judicial administration and accomplish its improvement, as the medical profession has taken charge of the health boards throughout the country and is administering the laws of health. We have been unable so far, except in a trifling number of the States, to so organize as to demand even the right to say who shall be let in and who shall be put out of the profession. Is anybody but the lawyers themselves responsible for this condition?

Again, the profession is often too inert even to defend its own territory against invasion. Although always comprising a comfortable majority of the legislatures, the lawyers are not always able to pass laws preventing banks, trust companies, and collection agencies from practicing law. Nearly everywhere in this country, except New York, a trust company can make a will for a customer with-

out moral or legal responsibility for its mistakes or ignorance, and may charge fees without accountability to anyone for their size or justification. With no excuse but a callous timidity toward resistance, the profession often allows its meagre fees for advice to be shared by automobile associations, its right to threaten legal process to be appropriated by collection agencies, and its long recognized integrity to be questioned by bonding companies who are expanding their business on the implication that as a class lawyers are not worthy of trust.

Unless the profession itself determines to support its dignity, little can be expected by way of support from the public. But if the bar will rouse itself from its lethargy, if it will realize that next to government itself it is the greatest factor in society, if it will realize that if the bar should collapse, justice and order would collapse with it, if it will recognize its responsibility and the power which still remains within its grasp, all these deficiencies and outside encroachments will be readily corrected, and even the economic disadvantage under which the profession labors will be rendered more bearable.

THE PRACTICING PHYSICIAN IN COURT

Experiences of General Practitioner When Caught as Witness in Net of Personal Injury Suit—Atmosphere of Court Room and Attitude of Court — Meets Long and Complicated Hypothetical Question—Detailed Proceedings—How He Showed Up in Next Morning's Newspapers*

By L. Howard Moss, M. D.
President of Society of Medical Jurisprudence of New York, 1928

A PRACTICING physician is received alike into the home of rich and lowly as a messenger of hope. The treatment accorded him is almost universally friendly and even gracious. He enters to render a much needed service and as he leaves the home the appreciation of the good offices he is rendering is apparent. "Thank you so much, Doctor. We are leaving everything in your hands and know that you will do all that can be done." Thus, he is accustomed to responsibility, and it is his aim in life to merit the trust and confidence which is imposed on him. Lack of confidence, lack of trust and lack of appreciation are rare exceptions.

His very entrance into the courtroom, reveals to him a different atmosphere from what he is daily accustomed. He has been issued a subpena to be present at 10 A. M. and give testimony in the case of James Brown vs. the X-Y-Z Corporation. He recalls that a year and a half ago he was called to attend little Jimmy Brown, the son of James Brown, and was told that the day before, while playing in the street, he had run into and been hit by a vehicle of the X-Y-Z Corporation. There had been no intimation that blame was to be attached to any one, other than Jimmy, since he was playing tag or attempting to steal a ride. The physician did not just remember the detail of what Jimmy was doing.

He remembered clearly that the boy was suffering merely from minor injuries. There was a slight simple contusion of the right thigh and the right shoulder, hardly calling for treatment. However, he prescribed rest in bed for a day or two, and suggested a mild lotion. It would at least keep the boy off the street. On leaving, he told the mother that if it would relieve her mind she might bring the boy to the office after a few days, and he would look him over again. The people were in moderate circumstances, so he made his fee $2.00, which was paid by the relieved and appreciative mother.

He remembered that about a month later, the mother had brought the boy to the office. Wouldn't he examine his spine? It seemed to his father, and the mother concurred, that there was a slight curvature of the spine. To be sure, it was very slight, but they had never noticed it before. He examined the spine. It was easy to appreciate how an uninformed and imaginative person might convince himself there was a very slight curvature, yet it was about as straight as boys' spines usually are, and presented no basis for the opinion that it had been in any way or to any degree, whatsoever, injured by the accident. Something was said about having a specialist examine the spine, but the physician did not remember anything very definite on that point.

About a month before the serving of the subpena, the physician had received a call from the boy's father, accompanied by a stranger, whom he introduced as a representative of the firm of lawyers who were handling the case of his son's injury. They informed the physician that the case was on the next calendar and should be reached early. The stranger wished merely to refresh the physician's memory in regard to the boy's condi-

*Address of incoming President, presented before the Society of Medical Jurisprudence, at New York Academy of Medicine, Jan. 9, 1928, reprinted with slight abbreviations, from the New York State Journal of Medicine.

tion when he had attended him, following the accident.

On learning that the physician had made no extensive record of the case, the lawyer stranger reminded him that the boy suffered from severe shock, that there were extensive contusions over the entire right side of the body, and that there was evidence of twisting of the spine. The physician was quite clear in his memory, and from his record, that the case showed merely slight contusions of the right shoulder and thigh. "Try to refresh your memory on these points," suggested the lawyer. "We shall want you to testify, and it is important that you recall all of the details mentioned. Of course, you will be well paid for your testimony, if we obtain the verdict to which we are clearly entitled," assured the lawyer stranger, as he was leaving.

The physician was mystified. It couldn't be possible that he had failed to appreciate the seriousness of the boy's injury. He, of course, would be willing to tell the Court just what he had observed. He had answered the subpena with that intent firmly in mind.

Somehow the Courtroom did not present the appearance he had expected. Although it was now five minutes of ten, there was considerable disorder. Many were in seats, others were standing around in groups, chatting more or less frivolously. Men in some instances had their hats on. There was no apparent effort at order or decorum. After a while, he espied in a far part of the room, little Jimmy Brown with his mother and father, and the lawyer stranger who had called a month previously. The latter immediately came over and led him to another man to whom he introduced him, saying: "This is Dr. A who attended Jimmy. He is prepared to testify fully as to the extent of his injuries." Was it possible that the lawyer stranger winked at him as he made this remark to the new stranger, whom he now understood was Mr. Jones, the trial lawyer for Jimmy? "Are you experienced as an expert witness?" inquired Mr. Jones. The fact that he was not, seemed entirely satisfactory, and Mr. Jones at once advised our physician, having his first super-man experience, that if he desired to make a good expert, he should limit his replies to the direct answer of questions asked him, and not volunteer any information. It might hurt the case, he was warned. Mr. Jones let it be said, was a man of high standing in the legal world, a member of a well-known and, as he believed, highly successful firm of lawyers. The advice of Mr. Jones was not to be taken lightly. He thanked him, and would be on his guard to follow it.

It was now well past ten o'clock, and there was no indication of the Court doing business. He heard an attendant remark that the Judge was in conference in the Chambers. Stepping out into the corridor, he came unexpectedly upon Mr. Jones in conference with little Jimmy and his father. "Now, Jimmy," Mr. Jones was saying, "you remember just how this accident occurred, don't you?" "Oh, yes sir," replied Jimmy, "I was playing——." "You mean you were crossing the street, don't you?" interrupted the trial lawyer. "Y-e-s," replied the boy—"and before starting across you looked up and down the street to make sure that the coast was clear," continued Mr. Jones. "Oh! yes," eagerly responded the boy; "and seeing no cars approaching in either direction, you started to walk rapidly across," said the lawyer. "Oh, no," replied the boy, "I ran." "Now think carefully," interrupted Mr. Jones. "When you come to think of it, aren't you quite sure that you just walked briskly across the street at the crossing?" "Oh, but I did run," repeated the boy. Mr. Jones, apparently annoyed by the persistence of the lad, turned a bit sharply to the father with the statement: "Well, if the boy insists on saying that, it is no use to continue with the case. No jury on earth will give a verdict under such circumstances."

Thereupon the father took the boy in hand, saying gently: "Now Jimmy, you know that Mr. Jones is a great lawyer, who is trying to help you." "Yes, sir," came the reply, somewhat hesitantly. "And he knows a great deal more than either you or I," continued the elder James. "Yes," said Jimmy. "And if he said you walked across the street, why in all probability that is right. Now, you're only a little boy and don't fully understand how important it is to say it just the way Mr. Jones tells you to. Now think carefully, and see if you can't say it exactly as Mr. Jones wants you to." "I'll try," faintly replied the boy; and leaving them further rehearsing the testimony, our young physician, in Court for the first time as a super-witness, returned unseen to the Courtroom, his confidence in the integrity of evidence somewhat shaken by what he had overheard.

It was ten thirty-five when the court officers awoke the waiting assembly to attention. Hats were ordered off, those sitting were aroused to their feet, and the Court entered and ascended the bench, the Court crier proclaimed his "Oyez! Oyez!" and something more, ending with: "you shall be heard," and the attendants ordered everyone to be seated. At last something of the dignity and order that had been expected was assumed. Now, surely, the trial to which he had been subpenaed was to begin. "Call the calendar," said the Court. Thereupon, the clerk read from a list the names of cases, to which there were various replies from the audience, such as "defendant" or "plaintiff ready;" after which, there were conversations, frequently heated on the part of the one addressing the Court. It was difficult for a mere witness, even though he be a super-witness, to understand much of this proceeding, excepting that three-quarters of an hour were thus consumed. Finally, Mr. Jones emerged from the group surrounding the bench, and came towards them. "We are number 27 on the calendar," was his remark, "and we ought to be reached any time within a week or ten days. I will let you know beforehand," he remarked. "Then the case is not to be tried today?" remarked the physician. "No, but we had to be prepared. Sometimes the whole list answers 'unprepared,' and we have to go right ahead," was the reply. "I wish I had known," was the physician's only remark, as he visioned the sacrifices he had made to

answer the subpoena, and the cases he had referred to other physicians. "We shall try to be very considerate of your time, Doctor," said Mr. Jones. "Try and keep in touch with your office, and we will telephone you when the case is reached."

It is unnecessary to recite the period of waiting for the case to be called. How many times he called his office, lest the summons should come and he not be within reach. The hours he spent looking up the pathology, the symptomology, the sequellae of a simple contusion, lest he should be found lacking when the supreme hour arrived; the search of the medical literature for cases of curvature of the spine, induced by a fall or blow that would leave a simple contusion of the right shoulder and thigh if such indeed existed. He had thought it all so simple, but he must at least justify his opinion, and modify it, if he found that he was mistaken.

After two weeks of uncertainty, he was informed on arrival home, at the close of a busy day, that Mr. Brown had called up and left word that the case had been reached, the jury chosen, and the taking of testimony begun, and that Mr. Jones wished him to be at the Courthouse, promptly, at 9:30 in the morning, for a conference. He was to be the first witness of the day. How was it possible, with his morning already filled with calls on important cases? He would do his best. By getting out an hour earlier, he would see several of the more serious sick cases, and that perhaps would enable him to spend an hour at Court. His testimony surely would not take but a few minutes—it was so simple. By 10:30 at the latest, he surely would be free.

Nine-thirty the next morning found him at the appointed place. Mr. Jones arrived at five minutes of ten. He was very sorry to have kept Dr. A waiting, but several important matters at the office had detained him. After all, there really wasn't much to be said. He had gone over the case with the lawyer of record, and everything was understood between them.

Court opened promptly. The first procedure was to withdraw the jury, while the lawyers discussed some technicality regarding the admission of evidence. Both Mr. Jones and the lawyer for the XYZ Corporation were fully prepared. Each was given full opportunity to state and to cite cases in support of his views. Law books were produced, the attendant several times going into the chambers, and returning with volumes for the Judge, the attorneys standing respectfully by while he read and pondered. Then followed more discussion. At first—each of the lawyers had been calmly persistent. As the Court appeared to lean to a decision in favor of Mr. Jones, the lawyer for the XYZ Corporation grew more emphatic. When finally the Court gave his ruling and the jury was recalled, Mr. Jones appeared calm, while his opponent was visibly perturbed. The mien of the Judge also was now sterner than before. It was 10:45 o'clock. "Call your next witness," said the Court, somewhat briskly, addressing Mr. Jones.

Undisturbed, Mr. Jones turned to our superwitness, and called in a voice easily heard throughout the Courtroom, "Dr. A, will you take the stand?" The moment had arrived. Assuming an outward poise that belied his internal feelings, our practicing physician quietly arose, and started for the witness box, conscious that the eyes of all in the room were upon him. He had proceeded but a few steps, when he was firmly, even though gently grasped by the arm, and directed by a uniformed Court attendant to alter his course and pass behind the jury box. Disturbing as it was, it at least gave him a minute longer in which to get hold on himself. Emerging from behind the jurors, he found himself facing the witness chair, beyond which was the bench at which the Judge was seated, busy with his papers, and apparently unconscious that a man of professional standing was approaching. He started to sit down, but was restrained by another attendant who said to him: "Raise you right hand." Whereupon, the clerk of the Court arose, and said in stentorian tones, easily understood, "You solemnly swear that the testimony you shall give in the matter now pending between James Brown, the plaintiff, and XYZ Corporation, the defendant, shall be the truth, the whole truth and nothing but the truth, so help you, God?" "I do," solemnly and sincerely asserted the prospective witness, ready to sink into the chair. Not yet, however; continuing to restrain him from sitting, the attendant leaned forward, so as to bring his ear nearer the witness' mouth, and said in a loud tone: "Name, please." Fortunately, his name was the one thing with which he was familiar. Had it been otherwise, it is quite probable he would have been unable, certainly without considerable hesitancy, to comply with the demand made upon him. He gave it in sufficient voice, as he supposed, for every one to hear; nevertheless, the attendant turned to the Court reporter, seated immediately in front, and repeated the name in a much louder tone, as though every one present was not already fully aware who he was. "Be seated," then said the attendant.

Mr. Jones arose. With a deliberation that was reassuring, he addressed him: "Dr. A, will you state your place of residence?" The lawyer for the defense corporation was already on his feet extending his hand, in gesture to the witness not to speak. Then, addressing the Court, he said, "Your honor, in view of your honor's ruling while the jury was out, I respectfully request the privilege at this time of further cross examination of the last witness, Mrs. Brown." Mr. Jones objected, explaining that Dr. A was a very busy practitioner, that he had already been waiting in Court, an hour, to give his testimony, and that any further delay would impose a hardship upon him. His opponent regretted exceedingly the necessity for pressing his point, but assured the Court that it was essential that the further cross examination be conducted, before the testimony of Dr. A was received. "Withdraw the witness," ruled the Court; whereupon, the practicing physician was addressed by the attendant with the command: "Stand aside!"

Mrs. Brown took the stand. How the cross examination was conducted; her replies, at times, timid and uncertain, again explosive and vindictive; the subsequent redirect examination in which Mr. Jones attempted to fortify her story where it seemed to have been weakened, and the many interpolated objections and discussions between the counsel and the Court; these are all be-

side the point. From it, the waiting practicing physician gained a new revelation of the case. For hours after the accident, the boy had been in a semi-conscious condition. The right side, including the arm and leg, were extensively bruised, from which the boy did not recover for two or three weeks; there had been extreme pain in the back for a period of months, with occasional recurrences, even at the present time; and as a consequence, the whole demeanor of the boy had changed. From a perfectly healthy, robust lad, he had become weak, irritable and timid, unable to participate in the usual sports of boys, afraid to be left alone, even in the day; in fact he had become, since the accident, "a nervous wreck," as the mother expressed it.

It was 11:25 o'clock when our practicing physician was recalled to the stand. "The witness has already been sworn," said the Court, as Dr. A took the chair, this time quite ignoring any effort of the attendants to direct or restrain him. "Will the stenographer read the question that was asked when we were interrupted," asked Mr. Jones, with a side glance at his opponent. The question was read, and answered, and the usual qualifications to practice medicine were established.

"Do you remember being called to attend Jimmy Brown, the son of James Brown, the plaintiff in this action?" questioned Mr. Jones. "I do," was the reply.

"The witness will uncross his feet," stated the Court in a voice heard throughout the room. Dr. A looked at the Judge in amazement. Had he misunderstood him? Was the Court indulging in levity, that he should so address him?

The Judge repeated his command. Dr. A glanced at his feet, and then at Mr. Jones, who motioned him to comply with the request. He reluctantly did so, the Irish in him thoroughly aroused, that he, a professional man, a practicing physician who had just qualified as an expert witness; and above all, that he, a gentleman, should be publicly subjected to such an indignity. Glancing at the jurors, he observed for the first time, that among them was a patient of his, from a well-to-do family that he attended. The juror avoided his glance.

"About when was it that you first attended Jimmy Brown," continued Mr. Jones in a gentle voice, as though to subdue his aroused feelings. "On July 5th, 1925," was the answer. "Now, of course, Doctor, we all appreciate that you see a great many sick people, and that it is sometimes difficult to remember all of the details of a particular case; but will you inform the jury, as fully as you can remember, just what you found when you first examined Jimmy Brown?" On objection from opposing counsel to the preliminary remarks, the Court ruled: "The Doctor may state what he found on his examination." From Mr. Jones, "Will you so state, Doctor." Answer: "I found a simple contusion of the right shoulder and the right thigh." "To make it plain to the jury, will you state just what you mean by a contusion, using every day language? And, Doctor, will you kindly direct your answers to the jury and speak loud, just as though you were talking to that last juror over there?" pointing to the farthermost juror on the back row. Dr. A cleared his throat, took a deep breath and replied in full voice: "Why a contusion is a lesion resulting from trauma, I mean a blow, and a simple contusion is one in which there has not been produced any accompanying dermal discontinuity, that is the skin is not broken." "Does it necessarily mean that the blow has not been a severe one?" queried Mr. Jones. "Not necessarily," was the reply. "Does it necessarily mean that the tissues beneath the skin have not been severely bruised, and the blood vessels torn, and possibly the muscles and the nerves injured?" continued Mr. Jones. "No," was the reply.

"Now, Doctor," interrupted the Court, "did you, in fact, find injury of the blood vessels and tissues, generally, at the various sites where the bruises occurred of which you have testified?" "Yes," said Dr. A. "So that there was indication of the parts having been hit a severe blow; that is what you want the jury to understand by your testimony on this point, is it?" said Mr. Jones, resuming the questioning. "Yes," was the reply.

Further questions and answers covered the general condition of the boy, the Doctor testifying that the boy might have been a bit restless, and that he did not notice any condition of the spine at that time. He had advised that the boy remain in bed, and the application of a lotion to the contused areas.

"Now, when did you last see the boy in connection with the injuries from this accident?" asked Mr. Jones, further adding, "I mean the time that he called at your office?" "That was about a month later." And at that time what did you find?" was the next question. "Why the contusions had healed," was the reply. "Am I correct in stating that you, yourself, are not an orthopedic surgeon?" next inquired Mr. Jones. "I am not," stated the Doctor. "However, your education includes a general knowledge of surgery; am I right in that?" asked the lawyer. "Yes," replied the practicing physician. "Then let me ask you this question," said Mr. Jones, "and I will ask you to follow it closely, and to wait before giving your answer till the Court has ruled on its competency."

Then followed a long reading of a complicated hypothetical question. It recited a robust boy, in normal health, walking briskly across the street, being struck by a rapidly moving vehicle, thrown on his right side, thereafter suffering from severe shock, and being in a condition of semi-consciousness for some hours subsequent to the accident; found on examination the next day by a physician to be suffering from severe bruises on the right side, involving particularly the right thigh and right shoulder, with the underlying tissues severely damaged; the condition being such that the boy suffered severe pain, and was confined to his bed, for at least, two or three weeks; and when at the end of a month, the case was discharged by the family physician, he was still suffering from injury to the spine, with curvature and subsequently was treated by a specialist; that, after the accident, the boy had exhibited, and even at the present time, continues to exhibit irritability, nervousness and other symptoms of chronic traumatic spinal neurasthenia, etc., etc., etc., ending with the query: "Assuming all of the above facts, can you state with reasonable certainty, the cause or causes of

the various abnormalities manifested, as described?"

As always happens at the completion, the opposing lawyer was on his feet, objecting that the question was irrelevant and immaterial, containing facts not in evidence in the case; and, further, objecting to the form of the question, and so forth and so on. When, with the aid, or at least with the assent, of the Court it had been specified, among other things, that no evidence had been submitted of a condition of chronic traumatic spinal neurasthenia, Mr. Jones, addressing the Court, stated: "If it please your honor, those portions of the question will be put in evidence through the testimony of a specialist, who will be the plaintiff's next witness. I am asking Dr. A the question, at this time, to expedite the trial, and conserve the time of the Court, and, as well, to avoid needlessly retaining Dr. A who is a busy practitioner, and has important cases awaiting his attention. I would respectfully ask that your honor permit the witness to answer the question at this time, subject to the introduction of this evidence, with the understanding that, if such testimony be not subsequently admitted, that this portion of the witness' testimony shall be stricken from the record, without objection on the part of the plaintiff.

The opposing lawyer objected to this assumption of facts not in evidence. The procedure was irregular, and prejudicial to the interest of the defendants. The Court suggested that he specify his other objections, and that they take the time to argue upon the form of the hypothetical question.

When, after a considerable time, during which the practicing physician was thinking more of his neglected practice than of the legal technicalities under discussion, the question had been adjusted, the opposing lawyer withdrew his objection to its being answered at this time, reserving the right to move it be stricken from the record, if the plaintiff failed to supply the missing evidence; and Dr. A was instructed to answer. "I can," was the reply. "Will you so state," quickly followed. "The accident and resulting injuries," said the practicing physician. "In other words, Doctor, you wish to, and do state to the jury, that the accident, as described in the hypothetical question, under the conditions therein stated, was a competent producing cause of the results therein described." "Yes," was the reply. "You may cross examine," and with these words Mr. Jones, with an approving glance at the jury, resumed his seat.

The cross examination was relatively brief, and was almost entirely directed to the hypothetical question. Had he seen any considerable number of cases of chronic traumatic spinal neurasthenia? Answer: "No." Had he ever seen a case prior to the one here under consideration? Answer: "No." Had he made the diagnosis of chronic traumatic spinal neurasthenia in the case of Jimmy Brown? Answer: "No." Had he ever heard of the disease or condition of chronic traumatic spinal neurasthenia, prior to its being called to his attention in this case? Answer: "He believed he had." Question: "Where?" He believed he had seen it in medical literature. Would he describe the condition of chronic traumatic spinal neurasthenia? He would say that the condition was characterized by a tendency to over excitability, and excessive fatigue, as a result of an injury involving the spine. Had he observed this condition in Jimmy Brown? He had not. So that from his own knowledge, he would not say that Jimmy Brown was suffering from the condition? Answer: "No." Question: "Yet you felt justified, in answer to the hypothetical question, to state that condition was induced by the accident." Answer: "Under the conditions—" The opposing lawyer, interrupting—"Now, Doctor, never mind about any explanation. The question is perfectly plain and I must ask you to answer it yes or no." Answer: "Yes."

"That is all," said the cross-examiner with a smile directed to his associate-counsel, evidently intended to show to the jury his feeling of triumph.

Dr. A moved as though to leave the stand, when Mr. Jones arose with: "Just one minute, Doctor. You are a general practicing physician and not a specialist in injury cases. Is that correct?" "Absolutely," replied our practicing physician. "That is all," said Mr. Jones. "Stand aside," said the attendant. "Call your next witness," said the Court and Dr. A dissatisfied, disappointed and dismayed, left the stand; and taking his hat and coat, departed from the scene of his unhappy experience, as Mr. Jones was announcing the name of another physician of whom he had never heard. It was 12:40 o'clock.

The next morning the following appeared in the local daily:

"LOSES SUIT FOR SON'S INJURIES

"The jury in the action of Mr. James Brown against the XYZ Corporation, to recover damages for the alleged serious injuries sustained, a year and a half ago, by his son, James, who was hit by a heavy vehicle of the defendants', brought in a verdict, late yesterday afternoon, in favor of the defending corporation. The jury was out less than half an hour. Dr. A, of blank street, was the leading expert for the plaintiff. Dr. B, of somewhere else, also testified. It seems that Judge J, before whom the case was tried, instructed the jury that it was their duty to decide whether the experts had testified intelligently, and without bias, or whether they were influenced by venal motives. The testimony of our esteemed citizen, Mr. C, director of the Y. M. C. A. gymnasium, that young Jimmy had, for the last year and a half, regularly attended the boys' classes, and had taken a leading part in all of the heavy exercises for boys of his age, without complaint or injury, is believed to have influenced the jury in reaching their verdict."

I have presented the incidents just described, not as anything unusual, but to picture ordinary occurrences which a practicing physician may experience. The picture may be erroneous in technical details—but that matters not. Every important incident is a statement of an actual occurrence. It is my purpose in bringing this subject before you, to stimulate a diagnosis of the causes of certain existing situations, that seem undesirable and unnecessary, in the relation of the practicing physician to court procedures, with the hope that, with these conditions in mind, you will be able, from time to time, to suggest appropriate remedies.

Probably all agree that any class of individuals who are especially liable to be summoned to Court as witnesses, and particularly as expert witnesses, should have included in their education, some simple fundamental instruction on the rules of evidence, and the obligations and rights of an individual as a witness. Such instruction might either be given in a special course in pre-medical education, or be included in a course on medical juris-

prudence as a part of the medical curriculum. I do not doubt that in many instances physicians who have inadvertently become involved in a case, by reason of their services as a practicing physician, are qualified as experts without the knowledge that such qualification is optional with them, and that by refusing so to qualify, their examination may be limited to a mere statement of facts.

Again, physicians as a rule understand in a general way that their relations to patients are confidential. Few, however, have any definite knowledge under what circumstances, and on what occasions, they are at liberty, or even compelled to reveal information which they possess by reason of such confidential relations. To be sure, when on the witness stand, they are advised and protected by the Court; but in their relations to family and friends, and in their relations to lawyers in conference, under these and other circumstances, the occasion is always liable to arise where they are in need of authoritative information.

From time to time, I have discussed with individual members of the Society, the possibility of some plan to lessen the sacrifice of time imposed upon the practicing physician in the matter of court attendance. It would seem that this ought to be accomplished, not because it is a matter of his personal convenience, but primarily because it has to do with the efficiency of the service he is rendering the community even to the extent of its becoming a question of life or death. . . .

The introduction of testimony by deposition in civil actions would enable the practicing physician witness to select the time, which, in a measure, would clarify the situation; but I am told that this is untenable, since it would deprive the opponent of the right of cross-examination. This is not so with regard to testimony taken outside the jurisdiction of the Court, and I cannot appreciate why it need be so in the matter of testimony of practicing physicians within the jurisdiction of the Court. Such deposition might be limited to testimony as to facts, excluding expert opinions. I am informed that there is a provision already existing, under which a practicing physician is not obliged to recognize an ordinary subpena to testify in regard to services rendered a patient in a charitable institution, but is obliged to recognize a subpena signed by the Court; it being assumed that the Court will issue such a special subpena, only when he has convinced himself that the testimony of the practicing physician is of vital importance to the case. To what degree the extension of such a procedure to all minor civil actions would relieve the situation, I am not prepared to state. It would seem as though much would depend on the idea of the Court as to what constituted "vital importance."

The subject of the hypothetical question with its "yes" or "no" answer is ever with us. In our November meeting the speaker, Dr. William A. White, gave emphasis to the fact that in regard to mental conditions, the hypothetical question is based upon an archaic conception, in law, of what constitutes mental competency and responsibility, and that the "yes" or "no" answer may be entirely misleading. Hence it frequently follows that conscientious physicians of equal ability, and of equally wide experience, give opposite answers because of the particular interpretation that they feel justified in putting upon the hypothetical question. This is done to the confusion of the Court and jury, and brings discredit to the medical profession, which the witnesses honestly and honorably represent. This misrepresentation of facts in the case by an unqualified answer of medical questions, including the hypothetical question, is by no means limited to conditions of mental diseases; yet I state from my personal experience that I have, more than once, been enjoined by the Court to limit an answer to yes or no, without qualification; when, in justice to the truth, I should not be required to do so. "Yes" or "no" may be half right; but even if it be ninety per cent right, the witness is not true to his oath who fails to testify as to the qualification necessary to justify his answer. Practical considerations and matters of policy may make it desirable to omit such qualifications from the standpoint of a particular party in the issue, the qualifications may weaken the force of the answer; but if this be so, it is merely because the truth is less firmly established than the yes or no answer would seem to indicate.

It has only recently been said that the foremost national problem that calls for solution is concerned with the spirit of lawlessness that prevails. Our courts are an institution to cope with this problem. Is it possible that this same spirit has crept into the Courts themselves, and that attorneys and witnesses alike, at times, become so zealous in the winning of decisions that they are not fully mindful of the high ideals of character which constituted the very foundations of our nation? My only purpose in raising this question is to importune the practicing physician to be mindful of his obligations to himself, as well as to the interests of his patient at law. Lawlessness in a nation of culture and power is a sign of decadence; in an individual, it is a sign of weakness. It is of greater worth to be honest than clever, even for a practicing physician in Court.

May I say a word in closing about the treatment of citizens at the hands of the Court, and the attendants. It is agreed that the Court is entitled to and should receive the fullest respect of all in attendance, no matter in what capacity; and, as well, of the community, in which it has jurisdiction; and that this respect should be observed in every relation of individuals to the court. To this end the Court is empowered with authority, that, within its own jurisdiction is nearly if not quite absolute.

This very fact, however, carries with it a reciprocal obligation, namely, that the Court shall so conduct itself as to be entitled to the respect which it demands. Subjecting those who unwittingly offend in some relatively minor and perhaps even questionable particular, to unnecessary public indignities, does not, in the speaker's opinion, constitute conduct that inspires respect, even though it may constitute an exhibition of power that intimidates. The delegation of power does not lessen but rather increases the obligation to maintain dignity of behavior, as well as of position. If there be truth in the saying "once a gentleman always a gentleman," then it may well be expected that the Court shall not cease to be a gentleman, in the expectation that thereby it shall create respect.

RESTATING LAW OF BUSINESS ASSOCIATIONS

Restatement to Set Forth Law Governing All Forms of Associations Organized for Profit—First Subject Studied Is Creation of Corporation Shares by Transactions Subsequent to Incorporation—Shareholders' Preëmptive Rights Found to Present Interesting Problems

By Alexander Hamilton Frey

Assistant Professor of Law at Yale University; Special Adviser for Restatement of Law of Business Associations

IN 1924, pursuant to a resolution of the Council of the American Law Institute, William Draper Lewis submitted a detailed Report to the Council on the Practicability of the Restatement of the Law of Business Associations. This Report convinced the Council that the subject was not so largely statutory as to be incapable of restatement, and in consequence Mr. Lewis was subsequently designated Reporter for the Restatement of the Law of Business Associations.

The original group of Advisers assisting in the preparation of this Restatement consisted of George E. Alter of the Pittsburgh Bar, James Byrne of the New York Bar, George F. Canfield of the New York Bar and of the Columbia University law faculty, Henry S. Drinker, Jr., of the Philadelphia Bar, Alexander Hamilton Frey of the Yale University law faculty, Cadmus Z. Gordon, Jr., of the Philadelphia Bar, William Browne Hale of the Chicago Bar, Edward Hopkinson, Jr., of the Philadelphia Bar, Dudley O. McGovney of the University of California law faculty, Gilbert H. Montague of the New York Bar, Harry S. Richards, late Dean of the University of Wisconsin Law School, Judge Thomas W. Swan of the Circuit Court of Appeals and former Dean of the Yale University School of Law, and Austin T. Wright of the University of Pennsylvania law faculty. The continued cooperation of several of these original Advisers has been terminated either by death or by the pressure of professional duties, but the Reporter has been fortunate in augmenting his group of counselors by the addition of E. Merrick Dodd of the Harvard University law faculty and of Judge George B. Rose of Little Rock, Arkansas.

From the outset one of the chief concerns of those engaged in this Restatement has centered about problems of scope. How inclusive should the Restatement be? Should it be limited to corporations, or should it also embrace partnerships and joint stock companies and business trusts? Should it deal with all types of corporations, or should it exclude charitable corporations and municipal corporations? Should it include cooperative associations? It was eventually determined that the Restatement should encompass all forms of associations organized for the purpose of producing economic profit for their members. Thus the Restatement will eventually set forth the law of business corporations, of partnerships, of joint stock companies, and of business trusts, and it will not treat of charitable corporations or of municipal corporations. It will also comprehend the law of cooperative marketing, consumers', production, or loan associations. While such cooperative associations may not be formed for "profit" in the sense of gain resulting from buying and selling or production and selling, they are organized for the direct economic advantage of their members. In this respect they are similar to the other associations enumerated, and are quite distinguishable from boards of trade, employers' associations, and trade unions.

In short, the underlying conclusion was that, while no sharp line of demarcation can usefully be drawn between different types of associations, the same group of persons should undertake the restatement of the law of all associations operating under comparable economic and social conditions. It should not be overlooked, however, that in this Restatement "Business Associations" is not regarded as a single topic, but rather as a collection of related topics, the law as to which can most feasibly be set forth only by those thoroughly conversant with all such associations.

After a detailed study of all the State incorporation statutes had been made for a variety of specific purposes, and after a tentative outline for the Restatement of the Law of Corporations for Profit had been prepared, it was determined that the first portion of this topic to be restated should be the creation of shares by transactions subsequent to incorporation. This abandonment of the more logical or chronological procedure of beginning with the law relating to the formation of corporations was felt to be justified because of the diversity of fundamental problems sharply presented by the matter selected for initial consideration.

Those engaged in this Restatement are perhaps peculiarly convinced that the usefulness of a statement of law is exceedingly limited unless the facts to which the statement is applicable are precisely denoted. It is for this reason that questions of scope have, as previously indicated, presented a constant source of difficulty. Consequently, progress may have seemed somewhat slow to those accustomed to a lesser degree of precision, but the work has been quietly gaining momentum, and an increasingly larger output may confidently be predicted as a result of much of the groundwork which has already been completed.

Tentative Draft Number 1 was submitted by the Council of the Institute to the members for discussion at the Annual Meeting in April, 1928. That Draft dealt with agreements for the immediate creation of shares as distinguished from contracts for the future creation of shares; the law relating to such contracts

was the subject-matter of Tentative Draft Number 2, which was submitted to the Annual Meeting in May, 1929.

One of the most interesting problems thus far encountered in this Restatement is that of shareholders' preemptive rights. The orthodox statement of preemption is that "every shareholder has a right to subscribe proportionately to any increase in the capital stock of his corporation." This rule is obviously inadequate when applied to modern corporations with complex share structures, for where various classes of shares with diverse incidents coexist, any rational apportionment of new shares must be based upon a common factor not defined in the rule as stated. The principal incidents of shares of any class relate to participation in voting control, in dividend payments and in capital distributions. Since these incidents cannot be added together in an attempt to arrive at the "total interest" in the corporation represented by a given share, the law has evolved separate rules to protect a shareholder from having his interests adversely affected by the creation of additional shares.

As to the voting incident, Section 12 of the Restatement says, in effect, that unless the articles of association provide otherwise (and subject to certain exceptions thereafter stated), a voting shareholder has a right that the corporation shall not create any voting shares, or other securities convertible into such shares, without offering to him such a proportion of the number of voting shares, or securities convertible into such shares, which it attempts in one continuous effort to create as the number of voting shares held by him (at a designated time) bears to the total number of existing voting shares.[1] Section 16 provides, in effect, that the right of a voting shareholder stated in Section 12 is not violated, if the corporation creates voting shares in return for property or services without first making him the offer stated in Section 12. Section 17 sets forth another exception to the effect that no shareholder has the right stated in Section 12 where the corporation created voting shares in lieu of voting shares acquired by it, if at the time of the acquisition the circumstances are such as reasonably to indicate an intention to recreate the said shares, and nothing has subsequently occurred to indicate that the intention has been abandoned.[2]

The further right of every shareholder not to have the value of his interest in the net assets or his right to participate in the net earnings adversely affected by the creation of shares is dealt with in Section 19 as follows:

(1) A shareholder has a right that the corporation shall not create any shares for less than the reasonable sale value of such shares if the proximate effect of the creation thereof would be to reduce the value of his interest in the net assets or the value of his right to participate in the net earnings of the corporation.

(2) The right stated in Subsection (1) is not violated, although shares are created for less than their reasonable sale value, if the shareholder is given an opportunity lawfully to have created as to him so many of the shares as would give him an interest in the net assets at least equal in value to his interest therein at the time he had an opportunity to subscribe plus the amount paid or agreed to be paid by him for the shares so acquired.[3]

Other sections set forth the remedies for threatened or actual violations of the foregoing rights and deal with certain relatively minor ramifications of the fact-situations involved, but the portions of the Restatement referred to are sufficient to indicate the general approach to the problem of protecting the interests of existing shareholders upon the creation of additional shares.

It will be observed that Section 12 deals exclusively with voting shares and ignores all other incidents of such shares in enunciating a basis for the apportionment of additional voting shares. Section 19, on the other hand, involves all classes of shares, whether they be voting or non-voting, and is concerned exclusively with the *price* at which it is proposed to create the additional shares. Furthermore, whatever right an existing shareholder may have under Section 19 to subscribe for new shares is entirely conditional upon such shares being offered by the corporation at less than their reasonable sale value. But the right of a voting shareholder set forth in Section 12 to subscribe proportionately for new voting shares is utterly unconditional and in no sense connected with the price at which such shares may be offered, since a voting shareholder's proportionate interest in voting control will inevitably be diminished at whatever price the new voting shares may be created unless he is accorded this right.

For these reasons the term "preemptive right" has been applied in this Restatement only to the right set forth in Section 12 and not to the right stated in Section 19. The two sections deal with equally important but entirely different rights of shareholders, and the term "preemptive right" is so familiar to the profession that it was thought wiser to adapt it to one of these rights than to discard it completely. Possiby this was an error.

1. The cases involving the apportionment of new shares among existing shareholders of different classes are Stone v. U. S. Envelope Co., 119 Me. 394, 111 Atl. 536 (1920); Page v. Whittenton Mfg. Co., 211 Mass. 424, 97 N. E. 1066 (1912); Jones v. Concord & Montreal R. R., 67 N. H. 234, 30 Atl. 614 (1892); General Investment Co. v. Bethlehem Steel Corp., 87 N. J. Eq. 234, 100 Atl. 347 (1917); General Investment Co. v. Bethlehem Steel Corp., 88 N. J. Eq. 237, 102 Atl. 252 (1917); Page v. American & British Mfg. Co., 129 App. Div. 346, 113 N. Y. Supp. 734 (1st Dep't 1908); Russell v. American Gas & Electric Co., 152 App. Div. 136, 136 N. Y. Supp. 602 (1st Dep't 1912); Branch & Co. v. Riverside Mills, 139 Va. 291, 123 S. E. 542 (1924); Riverside Mills v. Branch & Co., 147 Va. 509, 137 S. E. 620 (1927); 52 A. L. R. 220 (1928); Weidenfeld v. Northern Pacific R. R., 129 Fed. 305 (C. C. A. 8th, 1904); Borg v. International Silver Co., 11 F. (2d) 147 (C. C. A. 2d, 1925). In Niles v. Ludlow Valve Mfg. Co., 202 Fed. 141 (C. C. A. 2d, 1913) a preferred shareholder sought to participate in a proposed dividend of common shares exclusively to common shareholders, but the sole question considered was whether or not a preferred shareholder was entitled to participate in the distribution of net earnings beyond the stated amount of his preference.

2. Section 17 is a more accurate statement of the proposition involved in the familiar allegation that "preemptive rights do not apply to treasury shares." For a critical discussion of the authorities upon which the exceptions set forth in Sections 16 and 17 are based, see Frey, *Shareholders' Preemptive Rights* (1929), 38 Yale Law Journal 563.

3. For a more detailed consideration of these problems, see Morawetz, *The Preemptive Right of Shareholders*, 42 Harvard Law Review 186.

Review of Recent Supreme Court Decisions

(Continued from page 494)

answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense.

The case was argued by Mr. Martin W. Littleton and Mr. George P. Hoover for Sinclair and by Mr. Atlee Pomerene and Mr. Owen J. Roberts for the United States.

In the case of Gilchrist vs. Interborough Rapid Transit Co., reported in the July issue, the name of Mr. Irwin Untermyer of New York should have been given as representing the Transit Commission of New York on both original argument and reargument.

THE DIFFICULTY OF AMENDING OUR FEDERAL CONSTITUTION: DEFECT OR ASSET?

Twenty Six Hundred Amendments Have Been Proposed to the United States Constitution and Only Nine Have Been Adopted Since First Ten Were Inserted—Is This Difficulty of Amendment Desirable?—Writer Says It Prevents Hasty Enactment of Measures Not Really Necessary and Which Would Bring About Excessive Centralization of Government

By M. H. MUSMANNO
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THE remarkableness of the Constitution of the United States can be, and has been, ascribed to many individual features of the document itself and to many various outside things only circumstantially associated with it. But when one considers the short life of other written constitutions and their incessant mutability, one easily concludes that the most remarkable aspect of the United States Constitution is not only that it exists, but exists with such slight alterations to its original form.

There is not a State in the American Union, or a major nation in the world which has an unaltered written constitution dating back to 1789. Neither is there a State nor major nation with a constitution so little changed in vital features as the United States Constitution.

The following anecdote related by Hon. James M. Beck in his admirable work on "The Constitution of the United States," is not so exaggerated as it seems:

"Have you a copy of the French Constitution?" was asked of a bookseller during the second French Empire, and the reply was:

"We do not deal in periodical literature."

Since 1789 the United States has been through five major wars, one of which, and by far the severest, was fought on the very issue of the Constitution itself. Since 1789 the territory of the nation has increased over 400 per cent, and the population has increased over 2900 per cent. Nevertheless, in spite of these monster events and developments—events and developments which in other countries probably would have worked, and indeed invariably have worked drastic innovations and alterations—the form of government of the United States has remained precisely the same.

The Civil War was a terrific strain on the Constitution, threatening, as it did, to rend that document into many scraps of paper. But the Civil War was not the most trying strain to which the Constitution has been subjected. Its severest strain has not been in any single wrench, but rather in the steady, continuous, relentless pulling and stretching attempts made to have it cover this and that field of endeavor, fields never even contemplated within its original plan.

In other words, and to be specific, since the adoption of the Constitution in 1789, there have been more than 2600 efforts to amend the Constitution, with but nine successes. The first ten amendments we may disregard as such because they were added so soon after the adoption of the original articles that they have come to be regarded by practically all historians as a postscript, if not, indeed, an integral part of them. There must be something intrinsically remarkable about a document that can withstand 2600 aggressions—we will call them such—and yield only nine times.

Of course, it must be admitted that a great many legislators, and a few writers on the subject, have maintained that the scarcity of amendments to the Constitution is evidence of a defect, and not a virtue, in the document. They contend, denying its supreme perfection, that the Constitution has not been amended a greater number of times because of the difficult and cumbrous amendment process outlined in Article V. For example, Woodrow Wilson in his book, "Congressional Government," says: "It would seem that no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery in Article V."

In his book, "The Spirit of American Government," J. Allen Smith criticizes Article V by saying: "As a matter of fact it is impossible to secure amendments to the Constitution, unless the sentiment in favor of the change amounts almost to a revolution." And yet that sentiment has not been wanting when declared defects were shown to be defects. The first ten amendments, whether we consider them as part of the original Constitution or as supplements, were proposed, with others, in the First Congress six weeks after the organization of the House of Representatives, and were accepted by both Houses three months later. They were submitted to the states on September 25, 1789, and ratified by the requisite three-fourths on December 15, 1791, about fifteen months later. The decision in the case of Chisholm v. Georgia was rendered February 18, 1793, and two days later an amendment to the Constitution, designed to break down the effect of this decision, was proposed. For a year no action was taken on the proposal, and then a second resolution was introduced which passed both Houses by March 4, 1794, and was submitted to the states for ratification. In Janu-

ary, 1798, or three years and eight months after submission, the President proclaimed its proper ratification. The contested Jefferson-Burr election of 1800 revealed a defect in the election machinery which brought about the adoption of the Twelfth Amendment. The resolution was introduced October 21, 1803, passed December 9, 1803, and declared by the President on September 25, 1804, to have been properly ratified. Amendment XIII was passed by Congress February 1, 1865, and was proclaimed part of the Constitution December 18, 1865. The Fourteenth Article was completely ratified July 28, 1868, having been passed by Congress June 16, 1866. Amendment XV was submitted to the legislatures by a resolution of Congress passed February 27, 1869, and was ratified by the requisite number of states on March 30, 1870. The Sixteenth, Seventeenth, Eighteenth, and Nineteenth Amendments were ratified by three-fourths of the states, respectively, forty-three months, twelve months, thirteen months, and fourteen months after being passed by Congress.

It will be observed that the Eleventh Amendment was longest delayed in ratification—three years and eight months. And this took place but nine years after the adoption of the Constitution itself, and while the framers thereof were alive and many of them in office. If the machinery of Article V was inadequate or too cumbrous for the needs and exigencies of good government, this would have been the proper time for its amendment. The Twelfth Amendment did not go into effect until September 25, 1804, or four years after the cause for its adoption had arisen. And still the framers took no action to reduce the majorities required by Article V, or in any way to alter the amendment machinery. It seems safe to say then that it was understood from the beginning that amending the Constitution was a business that required a consideration and deliberation bordering on hesitation. As further evidence that it was just as difficult then if not more difficult than now to get an amendment ratified by the requisite number of states after having been definitely proposed by Congress, it may be added that during the first twenty-five years three amendments submitted by Congress to the states never went into effect because they failed of ratification.

It does not appear that in the early days of the Republic there was any general impatience or complaint because the states were slow to ratify. In fact, one of the States that objected most strenuously to the adoption of the Constitution because it contained no Bill of Rights—Virginia—was the last State to take the necessary action in order to bring about their incorporation into the Constitution.

In his "American Commonwealth" Mr. Bryce declares that the fewness of amendments to the Constitution has been due "not solely to the excellence of the original instrument, but also to the difficulties which surround the process of change." In this respect it is my observation that "the difficulties which surround the process of change" is what helps to make "the excellence of the original instrument." A constitution is to be either a fountain as in the United States or a running stream as in England. In the former we go to the well for power; in the latter, new channels are added and connected to the main stream until they penetrate every field of endeavor. The States in this country, to carry the metaphor a little further, have, on certain subjects, established conduits from their reservoirs of inexhaustible powers to the Federal fountain, and so, on those subjects the Federal Government has an unlimited, a sovereign supply of power and jurisdiction. The war clause (Art. I, Sec. 8, Cl. 11) illustrates this point. Why should it be necessary to include in or attach to the Constitution a long list of all the powers incident to declaring war? A broad grant is sufficient; Congress will work out the details. In this connection the comprehensiveness of the war power may be observed by the fact that during the last war the Federal Government took over the railroads, the telegraph and telephone lines, built merchant ships, regulated distribution of fuel and food, arranged for housing accommodations in certain industrial centers, established insurance for service men, and loaned money to war industries as well as equipped and directed the fighting forces.

Further examples are the post office clause and the interstate commerce clause (Article I, Section 8, Clauses 7 and 3). Under the former clause Congress constructs postoffice buildings, and establishes a postal savings bank; under the latter it passes laws against trusts and monopolies, and establishes an Interstate Commerce Commission. Although not one of these subjects is mentioned in the Constitution, it is evident that they are not contrary to the spirit of it. One of the first acts of the First Congress was to establish the executive departments, although the Constitution does not specifically give Congress that power but merely suggests it in Section 2, Article II and Article I, Section 8, Clause 18. As early as 1818 Congress conducted an investigation of the departments and other executive offices, although this authority is not listed in the powers of Congress, but is a natural corollary of the power of creation.

Our government is essentially dualistic—centralized and decentralized—and in their respective spheres centralization and decentralization reign supreme. If the central jurisdiction shows evidence of spreading into decentralized territory, the spirit of the Constitution holds it in check. What is this spirit? This spirit is the consciousness of unitary power in the states to adequately protect and police business completely intrastate, which is supported and strengthened by the realization of potential state amalgamation in affairs of interstate and collective-state importance.

For instance, let us observe that there has been proposed over fifty times an amendment declaring for federal prohibition of polygamy. Those zealously interested in the complete eradication of this evil would have the Federal Government take up the burden of a policeman to patrol every county and township in the country for possible violators of this interdiction. But yet this is not necessary, for since the Utah trouble, every State in the Union prohibits polygamous marriages and is quite capable of enforcing the prohibition. That there is unanimity of opinion among our national legislators as to the perniciousness of plural marriages there can be no doubt, but there is no evidence that the evil is so widespread as to require collective-state action. Hence, enthusiasts on the

subject receive little encouragement from even their best friends when it comes to adding to the fundamental law of the land an amendment which is purely a police measure and within the control of each state individually.

In the national legislature such enthusiasts speak into unresponsive ears. Those entrusted with the nation's business through headships of the committees involved may commit many legislative errors but in the matter of constitutional amending their heads are clear, their hearts are right—resolutions proposing alterations to the organic law of the land find convenient pigeon-holes, unless they bear the double stamp of universal approval and necessary Federal interference.

If a proposed amendment escapes the pigeonhole and actually shows itself on the floor of either House or Senate, Article V takes charge and becomes the severe referee, demanding that the resolution show a wide friendship and support—namely, two-thirds of the body—before being permitted to go any further. Gaining the goodwill of two-thirds of the Nation's representatives, it is then required to go before the country itself and show such an extensive popularity as to command the approval of three-fourths of the sovereign States, or otherwise it cannot be considered suitable material for inclusion in the majestic supreme law. Such a rule may seem too rigid and severe for progressiveness in governmental ideas, but with our system of government as it is, nothing short of it would prove efficacious, for otherwise the Constitution would carry a string of amendments entirely out of keeping with our idea of an organic law.

It is of course elemental in our study of American Government, that the States are completely sovereign with the exception of the powers granted to the Federal Government, and so thoroughly ingrained is that principle in the warp and woof of the Constitution itself, that even such a universal truth as the Deity is omitted from its articles, leaving proper recognition to the states themselves. Thus, when in 1894, Mr. Frye, of Maine, introduced an amendment declaring that the Preamble of the Constitution be changed to read:

"We, the people of the United States, devoutly acknowledging the supreme authority and just government of God in all the affairs of men and nations, and grateful to Him for our civil and religious liberty; and encouraged by the assurances of His Word, invoke His guidance, as a Christian nation, according to His appointed way, through Jesus Christ, in order to form, etc.," the amendment never got beyond the committee to which referred. This, it is to be remembered, not because of any denial of the truths therein expressed, but because the Federal Constitution does not and will not step into regions beyond the definitely limited fields of collective and interstate necessitous jurisdiction. Although in no sense subservient to the Federal Government, the Constitution is definitely a creation of the State Governments, whose powers are supreme, and if, as most if not all of them definitely acknowledge in their constitutions the supremacy of Providence in the affairs of men and government, it is unnecessary to repeat this in the Federal Constitution which is a working engine stripped of all observations of obviousness.

Since 1894, a resolution similar to the one just quoted has been introduced eight times but it never got beyond the committee to which it was referred for consideration.

One would think that if there is anything sacrosanct and which will forever remain inviolable in this country, it is the name itself—The United States of America,—and yet there have been two proposals to burden the Constitution with a rechristening. In 1893 Mr. Miller, of Wisconsin, proposed the Constitution be amended to have it declare "The name of this Republic" shall be the "United States of the Earth." His resolution contains many whimsical features, one section reading: "The army and navy, including the army and navy schools of organized murder, are hereby abolished." Another, that "the House and Senate shall vote by electricity." Also, that "No law shall go into effect or remain in effect that is not at all times demanded and sustained by a majority of the people whom its affects." The amendment was never taken up seriously in the House. Neither was its predecessor of 1866 providing that the name of this nation was hereafter to be "known and styled America."

Amendments attempting to distort the very idea of federal representative government have not been lacking. In 1914, Mr. Thayer, of Massachusetts, proposed that the United States take over from all persons holding over twelve acres of land that surplus and give to all other persons eight contiguous acres each, adding that at every census, United States' or World's, the fertile land should again be divided up so that each person would have an equal share.

While the declared intention of the sponsor of this amendment was to prevent poverty, it followed naturally that his proposal put into affect would also prevent any accumulation of wealth or capital. Three other legislators, however, have directly declared that accumulated wealth is dangerous to the welfare of the country and have introduced resolutions prohibiting the possession in the United States by any one person of a fortune exceeding ten million dollars, and giving the Federal Government power to confiscate any such surplus.

An amendment of a similar nature was proposed in 1914, by Mr. Morin, of Pennsylvania, designed to empower the State and Federal Governments to dispossess any citizen or combination of citizens, of all "wealth, property, power, influence or honor," gained through dishonesty. In 1917 he introduced this resolution and added that the Supreme Court should be denied the power to declare it unconstitutional.

Of late years much has been made of the initiative and referendum in some of the States of the Union. This movement was naturally reflected in Congress and so we find from 1907 to 1921 over a score of amendments proposed designed to establish the initiative and referendum as part of the federal election machinery. One of the proposed amendments went so far as to declare that the House of Representatives should have exclusive power of legislation, be responsible to no institution (President or Supreme Court, Senate to be

abolished) except the people who could by a petition of five per cent of the qualified voters for members of the lower house of the state legislature in each of three-fourths of the states, demand a referendum, within ninety days after passage, of any law of the House of Representatives, and that upon such referendum a majority of all the votes cast should declare its effectiveness or nullity.

A referendum amendment of an unusual nature under our system of government with the legislative and executive departments quite distinctly set apart, was that presented by Senator Bristow, of Kansas, declaring that if Congress fails to enact measures recommended by the President he shall refer such measures to the people for determination, at the next regular Congressional election.

It frequently happens that what appears to be a necessitous demand for a certain amendment really is not. For example, as the Constitution is silent as to the period during which a State may act upon a proposed amendment it was assumed that an amendment once proposed remained before the States until definitely accepted or rejected. Acting on this theory in 1873 the Senate of Ohio adopted a resolution ratifying the second of the twelve amendments submitted to the States by Congress in 1789, but then rejected. Some legislators felt certain that an amendment to the Constitution was necessary to limit this offering period and seven resolutions were proposed with that object in view. But a specific amendment of this nature is plainly unnecessary for it is an easy matter to add to each proposed amendment the period during which it will be open for ratification as was done with the Eighteenth Amendment.

The check rein held by Article V is put to no better use than in holding back enthusiastic legislators eager to alter the machinery of government, until there is some measure of accordance among the representatives as to which, if any, of the various plans submitted constitutes the best devisable and adaptable system. For instance, from 1826 to 1929 no fewer than seventy attempts have been made to change the method of electing presidents, all involving in some way the abolition of the presten electoral system and the substitution of direct popular election of the presidential candidates. Over fifty resolutions have been introduced attempting to change the date of Inauguration Day and thus also the Presidential term. At least sixty amendments have been submitted declaring for a one-term six-year presidency and over fifty attempts have been made to increase a Congressman's term to three and four years. Fifty-six resolutions have been introduced to give Congress power to legislate on uniform marriage and divorce laws.

Article V also holds back eager desire to pile up amendments during presumed crises when a careful inventory of powers already granted by the States might show that sufficient authority for adequate action to meet the exigencies already exists. Further, it may be that the supposed defect in our governmental machinery which it is intended the proposed amendment shall remedy is but a temporary ill in the social and political economy which will quickly adjust itself, or again it may be a matter upon which there already is sufficient legislation, and an amendment would not only be superfluous but injurious to the dignity and all-importance of the Constitution—the supreme and organic law of the land. For instance, during the first decade of the twentieth century when so much public alarm was felt over the growing power of monopoly combines, no less than eighteen amendments were introduced in an attempt to solve the problem. Then it was decided to amend the Sherman act, which was done, and since then no amendment has been submitted on the subject.

Mere quantity of numbers is not always an indication of the importance or probability of adoption of an amendment touching the subject covered therein. A few zealous individuals by the methodical introduction of resolutions on a subject are capable of giving a numerical importance to that topic not in keeping with its intrinsic merit. For example, from 1900 to 1911 Messrs. Underwood, Hardwick and Kitchin presented sixteen amendments calling for the repeal of the Fifteenth Amendment, but it is obvious that it would be impossible to get thirty-six states out of the forty-eight to agree to such a repeal.

The federal judiciary has enjoyed more immunity from attack than either of the other two departments — executive and legislative — but yet there have been times when decisions courageously rendered have so affected certain individuals and groups of individuals as to cause them to make war on the present judicial system. The most available feature of attack of the federal judicial system, is its life tenure, and thus in one hundred and forty years over sixty resolutions have been submitted to amend the Constitution and provide for a limited term of office for all federal judges. But the sanctity of the judicial ermine is another one of those things that comes within the protection of the "spirit" of the Constitution. The life tenure of judges was unanimously accepted by the Convention of 1787 and despite the sixty attempted aggressions it stands unmarred and unblemished with all the strength of the Constitution itself.

The American Constitution is undoubtedly the most remarkable state paper of modern history, if not indeed of all history. Not only did it emerge successfully from the Whiskey Rebellion, the Southern Rebellion and the threatened Civil War of 1876, but it has withstood the attacks of well-meaning fanatics and declared enemies. It has needed such little amendment because the principles it embraces are old and time-tried. The idea of the triple-departmental scheme—executive, judicial and legislative—goes back to Aristotle. Much of the federal machinery had been tested out in the colonial constitutions and was built of the wisdom of the ages. It is for this and corollary cogent reasons that hundreds and hundreds of proposed amendments fall harmlessly and ineffectively like flakes of snow in a fire.

The Constitution is brief and therein lies its strength. Composite, concise, it lives as a single entity with a soul, a spirit which speaks clearly, effectively and honestly—honestly because it represents the convictions of the nation faithfully arrived at through majorities that bespeak a practicable universal harmony. Constitutions of that brand are immortal.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

Andrew Johnson, Plebeian and Patriot, by Robert W. Winston. 1928. New York: Henry Holt & Co. Pp. xvi, 540.—This book might be entitled "A Saga of the Poor Whites of the Old South." The author has handled his subject delicately, candidly, conceding a social condition that existed, yet not treating of it in a partisan spirit. Should the condition be entirely disregarded, Andrew Johnson would become almost an enigma; if denounced, an injustice would be done to a civilization that had many redeeming qualities. That the Old South was aristocratic is true; that it at least countenanced the evils of slavery is true; that it did not condemn murder by dueling is true; that the poor white, the negro, the "person in trade," were excluded from the social life of the planter and the professional man is true; there was much of virtue, of courage, of courtesy and of culture, however, in that civilization; but it presented a condition productive of social hatreds. The aristocrat hated neither the poor white nor the slave. For him, as social factors, they did not exist. For the slave he felt affection for he was a possession and as a rule was treated with kindness and consideration. He did not hate the poor white, but did not regard him as an associate; and the courtesies extended to him were tinctured with condescension. The slave did not hate his master, but admired him, at least until emancipated; and then hatred was inflamed by the teachings of the carpet-bagger during the days of Reconstruction. Scattered through the South there were some poor whites occupying servient positions who were satisfied and entertained no particular dislike for the aristocrat. They were employees, satisfied to be employees; their ancestors had been employees, satisfied to be such. Between them and their employers there were frequently strong friendships without social equality.

To this scattered few belonged President Johnson's parents. He, however, did not inherit their contentment. He was a "poor white" in feeling and affiliation. The poor white did not belong to a strictly servient class: he owned property; he followed mechanical pursuits; he conducted various classes of business; his political and legal rights, in theory at least, were equal to those of the aristocrat, even to the extent of the ownership of slaves. But there was no affection between him and his slaves. They regarded him as inferior to the aristocrat, and he resented this distinction made against him by his own property and hated the social discrimination to which he was subjected. It is human to seek to personify what is loved or hated, and it is a short step from hatred of a class to hatred of particular individuals prominent in that class and pronounced upholders of it. It was not any love of the negro or any desire for his freedom that prompted the poor white to hate the aristocrat. Mr. Johnson was born into these conditions. He felt their injustice. He resented them; he was filled with a desire to see justice done to the class to which he belonged. In this desire there was, however, hatred; and hatred is always cruel and unjust. This hatred engendered hate, and bitterness produced bitterness; and in his struggle for justice for his class Mr. Johnson could not escape from exciting the hatred of the other class. It is extremely difficult for one belonging to a class that has been discriminated against, politically and legally, to differentiate between political and legal equality and social equality; and when the former is attained, the latter is insistently demanded. With all of his remarkable intellectual powers and force of character, Mr. Johnson could not attain to social equality with the aristocrat; and he therefore resented the culture of those who had attained it. This resentment he frequently showed in his manner; he was easily affronted; where he thought there was any condescension in polite conduct towards him, he showed his resentment by personal rudeness. The conflict between his class and that of the aristocrat was necessarily bitter and filled with personal hatred. He could not find any good in the aristocrat, and the aristocrat could see no good in him. To him the aristocrat was an usurper of social and political power; to the aristocrat he was a demagogue. He, however, made himself recognized as a man of ability, with honesty of purpose, a sincere desire to accomplish good, and gradually he began to perceive good in the individual aristocrat and the latter to appreciate his ability and honesty of purpose.

And then came the Civil War. Into that War went practically all of the South, regardless of class; and in the bitter struggle that followed the aristocrat was the military leader and the poor white admitted his capacity for leadership and honored him for his courage; and the aristocrat learned to respect the poor white for his courage and patriotism. All became fellows in their need, and acute class distinctions were at least temporarily forgotten. In water-soaked trenches, in charge and counter-charge, drinking from the same canteen, suffering the pain of wounds and hunger, sleeping upon blankets on which the blood of a fallen comrade had not yet dried men think of each other as fellow-men, and not as class enemies.

With the end of the War came the horrors of Reconstruction—horrors best forgotten and not retold. To those who had led them in battle the South, regardless of class, looked for guidance and defense, and the

Southern Brigadier became the leader in the South's Reconstruction—the great constructive power in American politics—and for a while there was no place in the South's political life for Mr. Johnson. That he wished to do right, that he wished the Union to be restored, that he wished the Southern States to be treated as sovereign states and not as conquered provinces, can not be denied; but popular feeling in the North ran too high for him to be of much service to his section or his State. Again hate ran rampant, and reason ceased to rule. Occupying a position of power in which he could have accomplished much good, accomplishment was balked by hate, and hate placed him on trial before a body of his peers, and that body sitting as a great judicial tribunal was shot through with hate and filled with partisanism. Hate failed of its entire purpose; but it destroyed Mr. Johnson's immediate usefulness.

It would be interesting to follow his career after the impeachment trial to the time the author calls his "come back," but the requirement for brevity in this review necessitates pretermission of consideration of that part of his life. Evidently time and a better understanding of the man had softened many animosities and promoted personal friendships, and experience had taught him that hate was a poor foundation upon which to build either private or public character.

His is a sad figure in the political life of the country. It is well that Mr. Winston should have written his book. In it there is much food for thought. From it one may learn the lesson often taught but unfortunately frequently forgotten: that partisanism alone is not patriotism and that a public man's character is made up of all that he does, all that he thinks and all that he says; that his good deeds should not be overshadowed with the mistakes he may have made. If patriotism consisted of love of country alone, Andrew Johnson was a patriot; but it does not. Patriotism consists of profound devotion to the country's good. Its convictions are deep, and its roots draw sustenance from the immutable principles of justice—that justice that seeks to render to every man his due. Patriotism is clear-eyed and unafraid; it has a conscience; it has the courage that undismayed faces martyrdom; its vision reaches unto far, far horizons; it aboundeth in intellectual charity. In the latter quality Andrew Johnson was lacking; but, in his day and time, in that he did not stand alone. In reading of him, one recalls the words of Jeremiah S. Black:

> "Patriotism, in its true sense, does indeed dignify and adorn human nature. It is an exalted and comprehensive species of charity, which hides a multitude of sins. The patriotism of Washington, which laid deep the foundation of free institutions and set the noble example of implicit obedience to the laws; the patriotism of John Hampden, who voluntarily devoted his fortune and his life to the maintenance of legal justice; the patriotism of Cato, who resisted the destructive madness of his countrymen and greatly fell with a falling state; the patriotism of Daniel O'Connell, who spent his time and talents in constant efforts to relieve his people from the galling yoke of clerical oppression; the patriotism of the elder Pitt, who, speaking in the cause of universal liberty, loudly rejoiced that America had resisted the exactions of a tyrannical Parliament—to such patriotism some errors may be pardoned. When men like these are found to have committed a fault, it is well that history should deal with it tenderly—
>
> 'And, sad as angels for the good man's sin,
> Weep to record and blush to give it in.'"

The book has some minor faults as a biography. The author too frequently resorts to quotations. Biography should be the sum of a man's life—not overladen with minor details.

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Calhoun and the South Carolina Nullification Movement, by Frederic Bancroft. Baltimore: The Johns Hopkins Press. 1928. 199 pages. $2.00.—Calhoun, Webster, the high protective tariff, and the doctrine of nullification receive scant mercy from Dr. Bancroft. James Madison, speaking through the lips of Edward Livingston, is the hero of this study, and not Calhoun. Disregarding the differences of opinion of the "Fathers" concerning the nature of their own work in the Philadelphia Convention of 1787, the author gauges the constitutional doctrines of both Webster and Calhoun by the Madisonian standard. Such an eighteenth century yardstick makes sorry figures of two nineteenth century leaders who believed in undivided sovereignty.

Nor does the author exercise more patience in his treatment of the character and the motives of the Nullifiers. Calhoun is portrayed as one who was blinded by the brilliance of his own theories, confident that no one could resist his reasoning,—the "political Prometheus who had tried to steal the sacred element of nationality from the Government while holding the Vice-Presidency and seeking the Presidency." (pp. 73-74, 157-160, 173-174, 183). The "South Carolina Exposition" of 1828 is to Dr. Bancroft a strange "mixture of logic sophistry and dictatorial magniloquence" (p. 47). Calhoun, in common with many another statesman, changed much in viewpoint between 1816 and 1828, but the extent of his inconsistency will be much exaggerated unless it is remembered that he supported a protective tariff at the early date as a means of national defense and pronounced it unconstitutional twelve years later as a regulation of commerce. Under the Constitution a measure may be justifiable for one purpose and not for another. Although it is customary to label Calhoun a nationalist in 1815 and a sectionalist in 1830, these terms can never be sharply differentiated. "A burlesque of statesmanship" is hardly a fair designation for the practice of Congressmen who vote according to the interests of their constituents rather than according to their own convictions of the national welfare. (pp. 13, 58.) Calhoun loved the Union during the whole of his long lifetime. His doctrine of nullification was meant for its preservation and to serve as a check upon his associates in South Carolina who wished to go the whole length of secession. In this respect he led, and was not forced along by, those to whom he had to look for political advancement.

Dr. Bancroft generally agrees with David F. Houston (*A Critical Study of Nullification in South Carolina*, New York, 1896), in his presentation of the basic causes of South Carolina's discontent. Fear that the federal government would legislate against slavery supplemented the resentment aroused by economic hard-times. The tariffs of 1828 and 1832 were merely used by the leaders "as an immediate and general irritant." (p. 20.) "Such persons in such circumstances lack thrift and good judgment, have no taste for serious study, and self-criticism is foreign to their natures. Accordingly, idle discontented and ambitious men, especially young men, were easily persuaded that it was time to assert their rights to do something positive, radical, heroic . . . " (pp. 25, 172-173.) These agitators were working upon a people "very excitable

and credulous" (pp. 88, 125) and gained their objective with Calhoun's help by 1832, in spite of the Unionists, who were "men of high character, great ability, and, what is rarer, of statesmanlike judgment." (pp. 93, 97-98, 133.) Persuaded that wisdom and statesmanship were confined to one side in this conflict, the author naturally concludes that "except favorable opinion in South Carolina, the attempt to establish nullification as a principle, or even a logical deduction from, the Constitution was a total failure." (p. 168.) The action of South Carolina merely hastened the fall of the protective tariff which would, in any event, have yielded to the verdict of the election of 1832 and to the mounting surplus in the Treasury. (p. 169.)

Accepting Dr. Bancroft's premises, the reader will enjoy this lucid, well-documented summary of the nullification struggle. But those who have profited from his other studies in the field of American history will regret that in this little volume he does Calhoun and his colleagues less than justice.

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Trademark Laws of the World, second edition, revised and edited by John H. Ruege. 1928. New York: Trade Activities, Inc. 974 pages.—The first edition of this very useful compilation was published in 1922. It was compiled by the present editor and W. B. Graham from the library and records of William Wallace White, of the New York bar, and with his co-operation. In it was published an introduction by John Barrett, former director general of Pan-American Union, and a foreword by Mr. White.

These items are omitted from the present edition, doubtless because the book is too well known to the profession to require any especial note of commendation.

The arrangement has not been changed; the text has merely been brought up to date and put into a new dress of paper, type and binding, which is very attractive and better than the first edition.

The work is all in English. It is made up of statutes and conventions relating to trademarks without comment or the citation of authorities. It covers all of the countries of the world that have trademark statutes or definite regulations for enforcing rights under trademarks. For example, it contains the decree of the Central Executive Committee of the Council of People's Commissaries of the Union of Soviet Socialist Republics on Trademarks, dated February 12, 1926, which may be called the substantive law of trademarks, and the accompanying decree determining the date when the rights shall commence, and other matters not of substantive right.

The International Conventions are not limited to those which the United States has joined, but includes also the Convention adopted at Montevideo by Argentine, Paraguay, Peru and Uruguay.

The high reputation of the first edition is a guarantee that the task which the compiler has set for himself of bringing the work completely up to date has been faithfully performed.

THOMAS EWING.

New York City.

Some Lessons from Our Legal History, by William Searle Holdsworth, 1928. New York: The Macmillan Company. Pp. viii, 193.—This book contains three lectures by Professor Holdsworth delivered at different law schools in this country and an address upon the dedication of the law buildings of Northwestern University, all in 1927. The author is undoubtedly the greatest living authority upon the history of the English common law. He holds the Vinerian professorship at Oxford, which was founded by the author of Viner's Abridgement, and of which Blackstone was the first lecturer. Those discourses became Blackstone's Commentaries, the best known book on English law. Holdsworth's lectures were first delivered at Northwestern University on the Julius Rosenthal foundation, established in 1919 in honor of a member of the Chicago bar, whose purity of professional life and whose learning and devoted work for his profession are well known to every Chicago lawyer. There is an introduction to the volume by Dean Wigmore of Northwestern University Law School, which is a model in its brevity and information.

The first lecture is entitled "The Importance of Our Legal History," and comprises an explanation of that part of the common law which has been made by lawyers in the course of the centuries through decided cases in the courts and through the books of authority in the profession, and of that other part of the common law which is made by the legislature in statutory form, coupled with a description of the machinery of legislation, its general subject matter, the influence of statutes on the common law, the influence of lawyers in determining the form of the statutes, and the general method of interpretation of legislation by the courts. The author demonstrates that the history of England cannot be well written without constant reference to the history of English law.

In this connection the author points out the value to the law of the centralized system of English courts in producing uniformity in principles of decision. This feature has been administered by an independent bar, and, generally speaking, in the late centuries, by an independent, well paid judiciary taken from the bar. These conditioning factors are necessary to a system of case law and if these factors do not exist a sound system of case law is practically impossible. We are so used to this system that we can with difficulty visualize a system where precedents are not controlling.

The second lecture is a continuation of the thought of the first lecture, which describes generally where to find the sources of historical knowledge upon the history of the common law; in the second lecture this same historical knowledge is shown to be necessary to understand the evolution of the common law, as embodied in our present law of today. Two illustrations are used; the first is the development of the writ of *habeas corpus*, which is chiefly concerned with an individual's personal security and freedom from illegal restraint. It shows the mediaeval idea of the basis of the writ, the connection with the Great Charter, and the development of the writ by the courts and by statutes. The second illustration is the institution of the jury, both grand jury and petty jury, and the influence of the jury system on political conditions, as a means of encouraging the growth of freedom and political stability in England. His general observation of what the jury system may become without proper safeguards in administration is full of instruction for us. The lecture closes with some very judicious observations upon two clearly observable facts in English legal history—the distrust on the one hand by the common lawyer of theoretical or severely logical speculations in regard to the law, and the tendency of the common lawyers

to create a practical system in close touch with changing political and economic conditions.

The third lecture is entitled "The Rule of Law." The lecturer begins with the thought that with increasing civilization the facts of life become more and more complex, and "no theory will fit them all; and so our common lawyers have been content to go from precedent to precedent and to build up gradually rules to fit each case, with the result that they have used a mixture of logic, of experience, and of legal and political theory, to evolve their principles." Two subjects are taken for illustration; one, the idea of sovereignty, the other, the personality of corporations and unincorporated associations. He illustrates from each of those subjects by their history the refusal of courts and lawyers in England to accept any hard and fast theoretical and logical rule; but the author does not point out a distinction in regard to the term "sovereignty" between the original, absolute meaning of the term, of a state sovereign in its relations with other states, which may be called external sovereignty, and the wholly different conception of the term when it is applied to the supposed rule that there must be in each independent state a sovereign power somewhere lodged, upon which there can be no limitations and restrictions. It is apparent that in English political theory, there is no analogy to the American constitutional theory of a supreme law, which is now being adopted in many governments. If the author had gone into the historical reasons why England has never had an actually controlling institution of government, like our federal and state constitutions, he could have made this lecture a further illustration of the genius of English lawyers under new conditions for building upon old foundations a unique development. But his discussion for England is masterly, and his generalization that an unrestricted power to make corporate or quasi-corporate bodies would take us back to mediaeval feudalism, is full of historical insight.

The third lecture closes with some very accurate observations on present tendencies. It is pointed out that the nations are now brought much closer together, and people easily gain wider points of view, and that legal and political thinkers, who look only at inconveniences in their own system, are too liable to formulate general propositions and universal remedies, which lead others to suppose that such propositions and remedies are applicable to all societies and systems of law. The antidote for all these extravagances is the study of the history of the system of law in question. This study will correct the theorists and leave a discerning lawyer, not a blind Eldon opposed to all reform, but a reformer like Burke, who deprecated a facility of change in breaking the chain and continuity of the commonwealth, yet recognized that new occasions create necessary innovations.

The address at the dedication is full of very interesting matter upon the study and teaching of law. It was entirely worthy of a great occasion.

If one were inclined to criticize, one would say that too much stress is put upon the common law, while little mention is made of that other great branch of English law, which is called equity. In spite of eulogies of the common law, one is compelled to admit that the great system of equity, founded upon the consideration of the inadequacy of the common law to furnish a remedy, is the most certain proof of the many wholly illogical processes of the common law. It is also the most certain proof of the narrowing influence of the jury system upon any legal system. But the history of equity was not considered germane to the author's subject.

This little book is the condensed result of very broad reading and wise thinking. The ease with which the material is handled is the result of conclusions thought out to the end, illuminated by the widest knowledge and research. It is eminently a book, as Bacon says, to be "read and digested," to be read and read again. It furnishes an outlook for students in the law schools and it can inspire the lawyer of mature years with a respect for the law which in too many lawyers is wanting. It is a corrective of the hard selfishness fostered by professional life. Matthew Arnold once proposed to the politicians a platform of Peace, Retrenchment and Reform, which he defined as "Peace to our nonsense, Retrenchment of our profligate expenditure of clap-trap and Reform of ourselves." This may seem a hard saying, but in this country this motto could be very well adopted by every bar association. When the judges of England met to formulate an address to the Queen on the opening of the new Law Courts, the draft proposed contained the phrase: "Conscious as we are of our own infirmities." One judge objected to that admission and Lord Bowen intervened in his cutting way: "Make it more true by putting it: 'Conscious as we are of one another's infirmities.'" Many a lawyer who talks loudly of reforming other lawyers ought to institute his reform work in his own private office. He could very well begin with these lectures in order to discover what he owes to himself as a member of the bar.

Chicago JOHN M. ZANE.

Prohibition, by Lamar T. Beman. Reference Shelf, No. 1, Vol. V. New York: H. W. Wilson Co., 1927. Pp. 154.

The Case Against Prohibition, by Charles A. Windle. Chicago: Iconoclast Publishing Co., 1927. Pp. 197.

These two small books are quite complete in their different approaches to the same subject. The first is a collection of the various important articles which have been delivered by eminent advocates during the past four years. The opinions on both sides of the question are presented and the extensive bibliography makes the volume extremely valuable to the student and debater.

Windle's work is more selective and argumentative. In 14 chapters of less than two hundred pages in all he has summarized cogently and clearly the many pleas which have been offered against the 18th amendment. The author emphasizes the futility of this law and his reasoning becomes more convincing every day as the people recognize that enforcement is just as impossible as Mrs. Partington's efforts to sweep back the tidal wave with a mop. The author emphasizes the hopelessness and impracticality of compelling obedience and shows that among our citizens the effect of the legislation has been disintegrating. The universal disrespect for this law has been carried widely to all other legal restrictions and our municipal management has become a by-word and reproach. He discusses the antagonisms between Prohibition and the Bible, as well as between Christianity, Morals and the Constitution of the United States.

As Windle points out, the act is wrong in principle, since it makes a crime out a natural indulgence simply because ordinary moderation is exceeded by weaklings. This is not the modern method of treating our sick. CHARLES B. REED.

Leading Articles in Current Legal Periodicals

ST. LOUIS, *Law Review*, April (St. Louis, Mo.)—The Right of Judicial Comment on the Evidence in Missouri, by Robert E. Rosenwald; Reputation of the Victim on the Issue of Self-Defense in Missouri, by Ruth E. Bates; Legal Investment for Trust Funds in Missouri, by J. Hugo Grimm; The Liability of an Owner of a Vehicle when due to His Negligence, His Guest is Injured, by Daniel L. Brenner.

Canadian Bar Review, May (Toronto, Ont.)—Recent Tendencies in English Jurisprudence, by A. L. Goodhart; Resale by Unpaid Seller of Goods, by Benjamin Russell; The Lawyer's Place in Society, by W. D. McPherson; The General Practitioner, by A. B. Hogg.

Yale Law Journal, May (New Haven, Conn.)—Costs, by Arthur L. Goodhart; Legislation Affecting Labor Injunctions, by Felix Frankfurter and Nathan Greene; Judicial Tolerance of Farmers' Cooperatives, by Walter H. Hamilton.

Minnesota Law Review, May (Minneapolis, Minn.)—Some Problems in Jurisdiction to Divorce, by James Lewis Parks; Conflict of Laws as to Contracts: The Restatement and Minnesota Decisions Compared, by Henry L. McClintock; Proof of Crime in a Civil Proceeding, by Littleton Groom.

West Virginia Law Quarterly, April (Charleston, W. Va.)—Judicial Councils, by Thurman Arnold; Judgment Lien Creditors' Suits in West Virginia, by Thomas Coleman; Domicile and Specific Intent, by Raymond J. Heilman.

Harvard Law Review, May (Cambridge, Mass.)—Parol Extinguishment of Trusts in Land, by Austin Wakeman Scott; Police Power—Legislation for Health and Personal Safety, by Ray A. Brown; Rights and Duties of the Committee in Bondholders' Reorganization, by Churchill Rodgers.

Kentucky Law Journal, May (Lexington, Ky.)—Some Anomalies in the Kentucky Negotiable Instruments Law, by Colvin P. Rouse; Risks of an Assignee under Restatement of the Law of Contracts, by Charles Rice McDowell; State Law and the Federal Courts, by Raymond T. Johnson.

Law Notes, May (Northport, N. Y.)—The Jones Law, by Theodore Megaarden; The Surgeon and the Unconscious Patient, by Ralph Straub.

Oregon Law Review, April (Eugene, Ore.)—The Conflict of Laws Restatement with Oregon Notes (Chapter 3, Topics A. B.), by Bernard C. Gavit; Report of Oregon Judicial Council, by Albert B. Ridgway.

Law Quarterly Review, April (Toronto, Ont.)—A Case Book on Constitutional Law, by Professor W. S. Holdsworth; Revised Statutes, by C. T. Carr; The Augustan Divorce, by Professor P. E. Corbett; The Crown as Litigant, by J. W. Gordon; The Field of Modern Equity, by H. G. Hanbury; Del Credere, by R. S. T. Chorley.

University of Pennsylvania Law Review, May (Philadelphia)—The Trust Powers of National Banks, by Albert Levitt; The Modern Rule Against Perpetuities, by Walter H. Anderson; Unconstitutional Conditions, by Maurice H. Merrill.

Law Notes, June (Northport, N. Y.)—What Constitutes "Collision" Within Automobile Insurance? by Ralph Straub; Copyright in Phototgraphs.

Wisconsin Law Review, April (Madison, Wis.)—Monopoly and Restraint of Trade under the Sherman Act (concluded), by Herbert H. Naujoks; Proximate Cause in Wisconsin, by W. Wade Boardman and V. A. Lundgren, Jr.

Yale Law Journal, April (New Haven, Conn.)—An Institutional Approach to the Law of Commercial Banking, by Underhill Moore and Theodore S. Hope, Jr.; Vicarious Liability and Administration of Risk II, by William O. Douglas.

Virginia Law Review, April (Charlottesville, Va.)—Judge-Made Law by William Minor Lile; Congressional Inquisition vs. Individual Liberty, by Frederic R. Coudert; Agreements to Reduce to Writing Contracts within the Statute of Frauds, by W. S. McNeill.

Alabama Law Journal, March (University, Ala.)—Venue of Civil Actions, by Walter B. Jones; The Rules of Alabama Chancery Practice Annotated, by W. D. Rollison.

Michigan Law Review, May (Ann Arbor, Mich.)—Rights of Holders of Preferred Stocks to Participate in the Distribution of Profits, by F. Finley Christ; The Immunity of Foreign States when Engaged in Commercial Enterprises: A Proposed Solution, by John G. Hervey; When Is a Treaty Self-Executing? by Leslie Henry.

Georgetown Law Journal, April (Washington, D. C.)—Some Comments on the Restatement of Agency, by Basil H. Politt; Some Recent Tendencies in the "Law of Insurance." by Hugh J. Fegan; Foreign Judgments—Enforcement of—Under the Comity of Nations, by Arthur A. Alexander; Evolution in Law, by Richard S. Harvey.

New York University Law Review, March (New York City)—Lord Coke and the American Doctrine of Judicial Power, by Louis B. Boudin; Disinheritance in New York, by Augustin Derby; The New York Statute of Frauds as Applied to Transactions Involving Realty, by Copal Mintz; The Nation or the States—Which? by John Edmund Hewitt.

Southern California Law Review, June (Los Angeles, Cal.)—The Liability of the Aviator to Third Persons, by Rudolf Hirschberg; The International Air Navigation Conventions and the Commercial Air Navigation Treaties, by Fred D. Fagg, Jr.; Bibliography of the Law of Aviation, by Rudolf Hirschberg.

Canadian Bar Review, June (Toronto, Ont.)—Municipal Taxation of Incorporeal Rights, by Arthur E. Langman; Domicile in Its Legal Aspects, by Walter S. Johnson; Some Random Reflections on No-Par Share Legislation, by M. B. Jackson; A Model Magistrate's Court, by E. Coatesworth.

Harvard Law Review, June (Cambridge, Mass.)—Dogma and Practice in the Law of Associations, by E. Merrick Dodd, Jr.; Congressional Reapportionment, by Zechariah Chafee, Jr.; Trusteeship in Modern Business, by Nathan Isaacs.

California Law Review, May (Berkeley, Cal.)—The Status of a Private Corporation Organized under an Unconstitutional Statute, by Oliver P. Field; The Taxation of National Banks, by Carl C. Plehn; Two Problems in Possession, by Albert Kocourek.

National University Law Review, May (Washington, D. C.)—The Connecting Link in World Law, by Charles Sumner Lobingier; Wanted: One and Only One Code of American Private Law, by Charles P. Sherman; Japan and the Occident, by Charles Pergler.

The Lawyer and Banker, and Central Law Journal, May-June (Detroit, Mich.)—The Magic of Possession; Legal Fiction of Insanity, by Milton Mackaye; Titles Out of the Ordinary, by George W. Thompson; Special Assessment Taxes, by Benjamin Harrow; Conditions and Restrictions.

University of Cincinnati Law Review, May (Cincinnati, O.)—Going Value Allowance in Ohio Rate Cases, by Irwin S. Rosenbaum; Restatement of the Law of Contracts by the American Law Institute, by Merton L. Ferson; Regulation of Motor Carrier Service and Rates, by John J. George.

University of Pennsylvania Law Review, June (Philadelphia, Pa.)—Pleading "Material Facts," by H. C. Dowdall; The Implied Obligation of an Employee, by John E. Hannigan; Calculating the Distribution of a Stock Dividend Between Life Tenant and Corpus, by John Lewis Evans.

Minnesota Law Review, June (Minneapolis)—The Concept of Income in Federal Taxation, by Henry Rottschaefer; Some Observations on the Law of Evidence: Family Relations, by Robert M. Hutchins and Donald Slesinger.

Iowa Law Review, June (Iowa City, Ia.)—The "Short Indictment Act," by Rollin M. Perkins; Mental Defectives and the Criminal Law, by Dwight G. McCarty; Monetary Stabilization and the Law, by Silas H. Strawn; The Statute Law of Wills, by Percy Bordwell.

Michigan Law Review, June (Ann Arbor, Mich.)—Fraudulent Intent in Trade Mark Cases, by G. C. Grismore; Massachusetts Trusts and Succession Taxes, by Maxwell W. Fead and Milton S. Green; The Italian Magistracy of Labour: A Fascist Experiment, by Leonard Manyon; A Letter to the Lawyers' Club, by William W. Cook.

Texas Law Review, June (Austin, Tex.)—Title to River Beds and Their Boundaries, by Wallace Hawkins; The Concept of "Negotiability" as Used in Section 47 of the Negotiable Instruments Law, by Bryant Smith; The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, by A. W. Walker, Jr.

Marquette Law Review, June (Milwaukee, Wis.)—The Chicago Water Diversion, by Ernest Bruncken; Effect of the Padlock Law upon Landlord and Tenant, by Bruno V. Bitker; The Children's Code and the Juvenile Court, by Edmund B. Shea; After Law School—What Then? by H. William Ihrig; Commercial Arbitration and the Law, by H. S. Wollheim.

FRANCIS BACON: A REPLY TO RECENT CRITICISMS

An Essayist of Highest Principles, a Lord Chancellor Confessedly Guilty of Corruption, He Has Been Called "The Most Odious Great Man of English History"— Was He Odious or Only Disappointing?

By Robert N. Wilkin
Of the New Philadelphia, Ohio, Bar

ONE of the great names of English law and of English letters is likely to be unduly stained by recent charges and insinuations unless such charges and insinuations are discounted as mere extravagance of expression. Sir Francis Bacon has long been a cause of controversy; his attractive, yet contradictory, characteristics have tempted every excursionist into English history to hurl a shaft of scorn or lay a wreath of praise. Differences of opinion regarding him are not new. But the danger in the recent criticisms lies in the fact that they come in such questionable shape.

In his recent biography, "Elizabeth and Essex," Mr. Lytton Strachey attempts a more comprehensive estimate of Bacon than is generally made; but he employs an epithet that leaves a slimy trail. And Mr. Raymond Mortimer, in a recent article on Mr. Strachey in The Bookman, comes to the defense of Bacon against "the old swill in irony" and what he thinks are unfair insinuations. But Mr. Mortimer is himself more openly defamatory than is Mr. Strachey. He refers to him as "Bacon perhaps the most odious great man in English history." So now what the great essayist seems to need is a defense against his defender.

If Mr. Mortimer had referred to Bacon as perhaps the most *disappointing* great man in English history, we would take no exceptions. It is true that he failed to maintain the standard of integrity which he led us to expect; but he was not altogether contemptible and odious. On the contrary it was the brilliance of his intellect that brought into prominence the dark shades of his nature. The failure of his conduct to measure up to the high expectations created by his writing gives us a distinct disappointment; but it should not repel us altogether. The proficiency of his mind is in such striking contrast to the deficiency of his character that we are prone to censure him unduly for conduct which, if considered in the light of his times, or as the conduct of a man less gifted, would excite no special comment. We contrast his faults with his virtues and our disappointment damns him more than is due.

I realize that the preceding sentences resort to a method of contrast which Mr. Strachey says is inadequate to explain the complicated nature of Francis Bacon, but I resort to the method, not for the purpose of explaining his nature, but to put us on guard against a want of understanding which begets a want of charity. Mr. Strachey well says:

"Francis Bacon has been described more than once with the crude vigour of antithesis; but in truth such methods are singularly inappropriate to his most unusual case. It was not by the juxtaposition of a few opposites, but by the infiltration of a multitude of highly varied elements, that his mental composition was made up. He was no striped frieze; he was shot silk. The detachment of speculation, the intensity of personal pride, the uneasiness of nervous sensibility, the urgency of ambition, the opulence of superb taste—these qualities, blending, twisting, flashing together, gave to his secret spirit the subtle and glittering superfices of a serpent."

And then the simile is developed to such an extent that, in a book so popular, it seems dangerous. Mr. Strachey continues:

"A serpent, indeed, might well have been his chosen emblem—the wise, sinuous, dangerous creature, offspring of mystery and the beautiful earth. The music sounds, and the great snake rises, and spreads its hood, and leans and hearkens, swaying in ecstasy; and even so the sage Lord Chancellor, in the midst of some great sentence, some high intellectual confection, seems to hold his breath in a rich beatitude, fascinated by the deliciousness of sheer style. . . . Intellect, not feeling, was the material out of which his gorgeous and pregnant sentences were made. Intellect! It was the common factor in all the variations of his spirit; it was the backbone of the wonderful snake."

But this elaborate simile, so characteristic of Strachey's style, while it accurately portrays the convolutions of Bacon's nature, carries an innuendo which is too invidious. The trouble with the modern dramatic biography is that it assigns to a man a certain character and then so emphasizes all facts that develop the character assigned that a reader can never thereafter think of the man as a real personality, but only as he was dramatized. And an epithet, which is very convenient to give color to a trait of character, too often colors the whole personality.

In order to reach a just estimate of Bacon let us first follow the example set by the Lord Chancellor himself and make a confession. Let us state his faults frankly and then see if there are any extenuating circumstances. In the words of Macaulay, "His faults were coldness of heart and meanness of spirit." They are brought to light in these two principal charges against him:

1. He prosecuted his friend and patron the Earl of Essex and "employed all the art of an advocate in order to make the prisoner's conduct appear more inexcusable and more dangerous to the State than it really had been."

2. He was guilty of corruption in office.

Now as to the first offense, we must admit that we should like him better if he had declined to assist in the prosecution of one who had been his personal friend and to whom he was so deeply indebted. A proper sense of gratitude would have prevented his acting as counsel for the Crown

against Essex. But nevertheless, we should remember that his profession was that of the law; and we should think of him in this connection as a barrister and not as a writer or philosopher. And we should compare his acts with the acts of other lawyers of that time. A book that makes it easy to do this is "The Story of The Inns of Court"—a book as replete with literary as with legal history.

We are given therein a striking picture of Sir Edward Coke as he conducted the prosecution of Sir Walter Raleigh for high treason. Coke was not only a contemporary of Bacon, he was Bacon's chief rival—and had taken both an office and a lady that Bacon had sought. Coke's statements against the chivalrous and wayward Raleigh strike harshly upon modern ears. They were cruel beyond need. He indulged in such extravagant invective that the historian is prompted to remark, "They must have been pleasant times to have lived in. The rules of evidence guiding the court were scarcely less ingenuous than the prosecutor's speech. Of the latter, it may be said, that he belonged to his age with a thoroughness that characterized all that he did." And Coke's position as "the greatest oracle of our municipal jurisprudence" has never been questioned because of the zeal with which he conducted his prosecutions.

Having assumed a part in the case against Essex, it was Bacon's duty to prosecute it vigorously, and we believe his conduct in the case conforms to the best practice of the times. His analytical skill was no doubt damaging to Essex, but his remarks were not so vituperative as Coke's. And while we disapprove his appearance against Essex, we must not forget that he had cautioned the Earl against the course which led to his ruin, and had been frank enough to say that, much as he loved him, he loved much better "the Queen's service, her quiet and contentment, her honour, her favor, the good of my country and the like."

As to what was said at the conferences between the Queen and Bacon and between Bacon and her councilors we are not fully informed. Here again Bacon's smooth intellectual contortions suggest to Strachey the coils of the serpent. But from all that is brought to light we cannot see that Bacon was false or wanton. There is truth in his statement: "I have spent more time in vain in studying how to make the Earl a good servant to the Queen and state than I have done in anything else." And loyalty does not require that one should follow a friend in his folly. Bacon's position was difficult. He had been a friend and protégé of Essex, but he had also been a courtier and Crown counsel. Mr. Strachey says, "If, braving the Queen's displeasure, he had withdrawn to Cambridge, . . . and devoted himself to those sciences which he so truly loved . . ." Ah! I wish he had. But let us consider his conduct from his position and the attendant circumstances.

Every age has its crime complex. In one age it is heresy, in another it is witchcraft. In our day it is violation of the Volstead law. In the reign of Elizabeth it was treason. A man may be guilty of any other crime and hope to be acquitted or pardoned. But woe to the man who is even suspected of the complex-crime of his day. To be accused is to be condemned. As Strachey says, a state trial for treason in Elizabeth's reign was a mere formality. Elizabeth's father had been too promiscuous and too heretical to leave an unquestioned succession to the throne. And the imminence of plots against the queen only served to intensify her rigor against them. To champion one accused of treason was itself an act of disloyalty to her. If Bacon had declined to appear against Essex, he would have had to retire under suspicion. If we concede him the right to engage in his profession, then we should judge him according to the rules of the game at that time. And the practice of law, statecraft and politics have always been, and were especially in his day, a game of expediency. The Earl was an emotional derelict, and his conduct had been open and violent; he had locked up the Queen's ministers, had been in correspondence with James of Scotland, and had led an armed force through the streets to incite the populace. If under the same conditions another man of the day had decided to support the government against his former friend and benefactor, would we be so severe? Nevertheless we are disappointed in Bacon.

II.

Now as to the charge of corruption in office, what can we say, since he confessed? Well, we can say that he confessed—that's something. Bacon had an inordinate love for position, riches and splendor and, as Lord Campbell says, was "'without any steadiness of principle." But his confession proves the worth of his own statement in his essay on Truth: "It will be acknowledged even by those that practice it not, that clear and round dealing is the honor of man's nature." Bacon's intellect was too keen to misunderstand the situation. His confession was full and sincere. And then, probably for the first time, he realized how far astray he had been led by vanity and pride. He knew that his better nature had been neglected. In his Prayer or Psalm, written while the charges of bribery were pending, to his God he said: "Besides my innumerable sins, I confess before thee that I am debtor to thee for the gracious talent of thy gifts and graces, which I have neither put into a napkin, nor put it, as I ought, to exchangers, where it might have made best profit, but misspent it in things for which I was least fit; so I may truly say, my soul hath been a stranger in the course of my pilgrimage."

The attempt has been made repeatedly to exonerate Bacon by pointing out the prevalence of corruption at that time. But this consideration fails as a complete defense for the very reason that he was accused and condemned at that time. And it is to Bacon's credit that he did not plead such a defense. Neither his nor the public conscience was altogether callous. But nevertheless it is right for us to bear in mind the crudeness of the times in order to form just judgments. As Mr. Strachey says: "Below the surface of caracoling courtiers and high policies there was cruelty, corruption, and gnashing of teeth." And then with delightful skill he cites a revealing incident, the case of Mr. Booth who was condemned to imprisonment and the loss of his ears. To Lady Edmonds, a lady-in-waiting who sought his release, the Queen replied: "If your ladyship can make any good commodity of this suit, I will at your request give him releasement. As for the man's ears . . ." The Queen raised her

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And then the simile is developed to such an extent that, in a book so popular, it seems dangerous. Mr. Strachey continues:

"A serpent, indeed, might well have been his chosen emblem—the wise, sinuous, dangerous creature, offspring of mystery and the beautiful earth. The music sounds, and the great snake rises, and spreads its hood, and leans and hearkens, swaying in ecstasy; and even so the sage Lord Chancellor, in the midst of some great sentence, some high intellectual confection, seems to hold his breath in a rich beatitude, fascinated by the deliciousness of sheer style. . . . Intellect, not feeling, was the material out of which his gorgeous and pregnant sentences were made. Intellect! It was the common factor in all the variations of his spirit; it was the backbone of the wonderful snake."

But this elaborate simile, so characteristic of Strachey's style, while it accurately portrays the convolutions of Bacon's nature, carries an innuendo which is too invidious. The trouble with the modern dramatic biography is that it assigns to a man a certain character and then so emphasizes all facts that develop the character assigned that a reader can never thereafter think of the man as a real personality, but only as he was dramatized. And an epithet, which is very convenient to give color to a trait of character, too often colors the whole personality.

In order to reach a just estimate of Bacon let us first follow the example set by the Lord Chancellor himself and make a confession. Let us state his faults frankly and then see if there are any extenuating circumstances. In the words of Macaulay, "His faults were coldness of heart and meanness of spirit." They are brought to light in these two principal charges against him:

1. He prosecuted his friend and patron the Earl of Essex and "employed all the art of an advocate in order to make the prisoner's conduct appear more inexcusable and more dangerous to the State than it really had been."

2. He was guilty of corruption in office.

Now as to the first offense, we must admit that we should like him better if he had declined to assist in the prosecution of one who had been his personal friend and to whom he was so deeply indebted. A proper sense of gratitude would have prevented his acting as counsel for the Crown

against Essex. But nevertheless, we should remember that his profession was that of the law; and we should think of him in this connection as a barrister and not as a writer or philosopher. And we should compare his acts with the acts of other lawyers of that time. A book that makes it easy to do this is "The Story of The Inns of Court"—a book as replete with literary as with legal history.

We are given therein a striking picture of Sir Edward Coke as he conducted the prosecution of Sir Walter Raleigh for high treason. Coke was not only a contemporary of Bacon, he was Bacon's chief rival—and had taken both an office and a lady that Bacon had sought. Coke's statements against the chivalrous and wayward Raleigh strike harshly upon modern ears. They were cruel beyond need. He indulged in such extravagant invective that the historian is prompted to remark, "They must have been pleasant times to have lived in. The rules of evidence guiding the court were scarcely less ingenuous than the prosecutor's speech. Of the latter, it may be said, that he belonged to his age with a thoroughness that characterized all that he did." And Coke's position as "the greatest oracle of our municipal jurisprudence" has never been questioned because of the zeal with which he conducted his prosecutions.

Having assumed a part in the case against Essex, it was Bacon's duty to prosecute it vigorously, and we believe his conduct in the case conforms to the best practice of the times. His analytical skill was no doubt damaging to Essex, but his remarks were not so vituperative as Coke's. And while we disapprove his appearance against Essex, we must not forget that he had cautioned the Earl against the course which led to his ruin, and had been frank enough to say that, much as he loved him, he loved much better "the Queen's service, her quiet and contentment, her honour, her favor, the good of my country and the like."

As to what was said at the conferences between the Queen and Bacon and between Bacon and her councilors we are not fully informed. Here again Bacon's smooth intellectual contortions suggest to Strachey the coils of the serpent. But from all that is brought to light we cannot see that Bacon was false or wanton. There is truth in his statement: "I have spent more time in vain in studying how to make the Earl a good servant to the Queen and state than I have done in anything else." And loyalty does not require that one should follow a friend in his folly. Bacon's position was difficult. He had been a friend and protégé of Essex, but he had also been a courtier and Crown counsel. Mr. Strachey says, "If, braving the Queen's displeasure, he had withdrawn to Cambridge, . . . and devoted himself to those sciences which he so truly loved . . ." Ah! I wish he had. But let us consider his conduct from his position and the attendant circumstances.

Every age has its crime complex. In one age it is heresy, in another it is witchcraft. In our day it is violation of the Volstead law. In the reign of Elizabeth it was treason. A man may be guilty of any other crime and hope to be acquitted or pardoned. But woe to the man who is even suspected of the complex-crime of his day. To be accused is to be condemned. As Strachey says, a state trial for treason in Elizabeth's reign was a mere formality. Elizabeth's father had been too promiscuous and too heretical to leave an unquestioned succession to the throne. And the imminence of plots against the queen only served to intensify her rigor against them. To champion one accused of treason was itself an act of disloyalty to her. If Bacon had declined to appear against Essex, he would have had to retire under suspicion. If we concede him the right to engage in his profession, then we should judge him according to the rules of the game at that time. And the practice of law, statecraft and politics have always been, and were especially in his day, a game of expediency. The Earl was an emotional derelict, and his conduct had been open and violent; he had locked up the Queen's ministers, had been in correspondence with James of Scotland, and had led an armed force through the streets to incite the populace. If under the same conditions another man of the day had decided to support the government against his former friend and benefactor, would we be so severe? Nevertheless we are disappointed in Bacon.

II.

Now as to the charge of corruption in office, what can we say, since he confessed? Well, we can say that he confessed—that's something. Bacon had an inordinate love for position, riches and splendor and, as Lord Campbell says, was "'without any steadiness of principle." But his confession proves the worth of his own statement in his essay on Truth: "It will be acknowledged even by those that practice it not, that clear and round dealing is the honor of man's nature." Bacon's intellect was too keen to misunderstand the situation. His confession was full and sincere. And then, probably for the first time, he realized how far astray he had been led by vanity and pride. He knew that his better nature had been neglected. In his Prayer or Psalm, written while the charges of bribery were pending, to his God he said: "Besides my innumerable sins, I confess before thee that I am debtor to thee for the gracious talent of thy gifts and graces, which I have neither put into a napkin, nor put it, as I ought, to exchangers, where it might have made best profit, but misspent it in things for which I was least fit; so I may truly say, my soul hath been a stranger in the course of my pilgrimage."

The attempt has been made repeatedly to exonerate Bacon by pointing out the prevalence of corruption at that time. But this consideration fails as a complete defense for the very reason that he was accused and condemned at that time. And it is to Bacon's credit that he did not plead such a defense. Neither his nor the public conscience was altogether callous. But nevertheless it is right for us to bear in mind the crudeness of the times in order to form just judgments. As Mr. Strachey says: "Below the surface of caracoling courtiers and high policies there was cruelty, corruption, and gnashing of teeth." And then with delightful skill he cites a revealing incident, the case of Mr. Booth who was condemned to imprisonment and the loss of his ears. To Lady Edmonds, a lady-in-waiting who sought his release, the Queen replied: "If your ladyship can make any good commodity of this suit, I will at your request give him releasement. As for the man's ears . . ." The Queen raised her

shoulders and the Lady raised her price. . . . And another revealing incident, which occurred in the reign of the succeeding sovereign, is recorded in "The Story of the Inns of Court": "When the Attorney-Generalship became vacant by Bacon's advancement to the Lord Keepership, Yelverton appears to have refused to negotiate with any of the Court brokers, or to make any terms for payment of money for the office. But, according to his own account, 'when the business was done, he went privately to the King and told him he would out of his duty give him £4,000 ready money. The King took him in his arms, thanked him, and commended him much for it, and told him he had need of it, for it must serve even to buy him dishes.'"

Now we do not think of Queen Elizabeth and King James as we think of an executive today who sells pardons or accepts cash for appointments. But nevertheless we are deeply disappointed in Bacon.

Some persons are beset with qualities which beget high expectations in others, so that no one is satisfied with anything they do except it be of very high order. Bacon was of this sort. His intellect was so keen, his insight so clear, his understanding so broad and his expression so exact, that the very best was expected of him in all his varied capacities. Because he was great and good in many things, he was expected to be great and good in all things. And, as Ernest Dimnet points out in "The Art of Thinking," "Good men generally think right. When they do not it seems unnatural, and the lower parts of our soul, the insurgents in us always ready for an outcry, triumph meanly." Bacon, regardless of his virtues, was human. He could not maintain in his political life the high standard of excellence portrayed in his writing. His genius was too facile to be firm. And we are unable to allow Bacon the same inconsistency between profession and performance which we readily allow to lesser men.

But Bacon's inconsistencies and failures, although they disappoint us, are not such as to warrant the epithet, "most odious great man in English history." His mistakes, so natural in his day, sprang, not from any propensity to evil, but from an excessive love of fine "feathers" (to borrow his word) and his overweening confidence in his intellect. Of course an inordinate love of worldly possessions and positions is in itself an indication of meanness of spirit. Truly great spirits need neither this world's goods nor this world's honors; they are in communion with the eternal verities and are not attracted by transitory pleasures or ephemeral praise; worldliness has no appeal to them because they do not need the world; they can suffer the cross or drink the cup of hemlock with equanimity and grandeur of soul. But surely Bacon is not to be despised because he failed of that lofty ideal.

And of all periods of history, our age should be the last to upbraid him for worldliness and overconfidence in the intellect. He was a precursor of our times, and we are branded with his blemishes. Hardness of heart and meanness of spirit take new forms with new times, and frequently seem to be harder and meaner when more refined. Until we have turned from the hard road of materialism and have heard again, from our own lips, his words, "my soul hath been a stranger in the course of my pilgrimage," we have not profited by his mistakes.

The trouble is, we magnify Bacon's faults and lose sight of his virtues. We see only the stain on the sumptuous robe of the Lord Chancellor. We should emulate the lawyers of his day, who, after he had been divested of his robes of office, received him back with gracious charity to his beloved Gray's Inn, where in propria persona he gained true perspective and did much good work. The lawyers found, and still find, rich reward for their charity in the wonderful garden which he made for the Inn, and his literary garden will richly reward our favorable consideration.

As Ben Jonson said: "No man ever spoke more neatly, more pressly, more weightily, or suffered less emptiness, less idleness in what he uttered." It would be well if each of us could say with Jonson, "My conceit of him was never increased towards him by his place or his honors [and I wish we might add: nor decreased by his retirement] but I have and do reverence him for the greatness that was only proper to himself, in that he seemed to me ever, by his work, one of the greatest men and most worthy of admiration that had been in many ages."

Los Angeles, Calif.—Superior Court Judge Albert Stephens of Los Angeles with court attaches and opposing attorneys in a suit concerning placer gold mining claims, leave aboard a Western Air Express Plane prepared to inspect the disputed properties and try the case at the same time while viewing the land. The cases concern claims which will be covered with water on completion of the world's largest dam in the San Gabriel Canyon Dam at Acusa, Calif., and nearly ten days of the Court's time will be saved by the procedure. Photo shows the court in session. Left to right are: John Martin, attorney for the miners whose claims have been condemned; Ed Allen, witness; Judge Albert Stephens; Alfred Dennis, attorney, and Ray Dowds, attorney for Los Angeles County.—Photograph from Wide World Photos.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Illinois

New Organization for Annual Meeting Adopted—Judicial Advisory Council's Work Discussed

The highlight of the first session of the Fifty-third Annual Meeting of the Illinois State Bar Association, held at Rockford, June 27-28, was the address given by President Franklin L. Velde upon the subject "To Promote Reform in the Law." In his address, Mr. Velde reviewed the history of the legal proefssion in the state of Illinois, particularly with reference to the history of the rule-making power of the courts and the various movements toward the granting of a greater freedom in the exercise of this power. He traced the history of the two bills, Senate Bill No. 83 and Senate Bill No. 539, in the recent session of the State Legislature. The former bill granted to the Supreme Court of the state the power of making the rules of practice, but was defeated. The latter bill, however, providing for the establishment of the Judicial Advisory Council, passed in both houses and was subsequently signed by the governor.

Following Mr. Velde's annual address, the reports of the standing committees were read, after which the amendment to the By-Laws of the Association affecting the organization of the annual meetings was adopted with a slight amendment. Under this plan as adopted, the Association at its annual meetings will have delegates from each of the local bar associations recognized by the State Association. Each local bar association will be entitled to three delegates, with one additional delegate for each ten members or major fraction thereof belonging to the State Association, not to exceed forty delegates from any one local association. In addition to this, any ten members of the State Association in any Supreme Court District, who are not members of any affiliated local bar association, shall be entitled to accredit a delegate to any meeting of the State Association by signing a certificate to that effect. Alternates having the same qualifications as delegates, who may act in the absence of delegates, may be selected in the same manner as the delegates. This amendment merely changes the former representation of the local bar associations in the annual meetings of the State Bar Association.

Two important meetings were held on the evening of June 27 when the delegates from the Local Bar Associations met at the Nelson Hotel and the Supreme, Circuit and Superior judges of the state met at the Faust Hotel. The local bar delegates meeting, presided over by Clarence W. Heyl, second vice-president of the Association, was chiefly concerned with problems peculiar to the local associations, while the judges were interested chiefly with the newly created Judicial Advisory Council.

In discussing the question, "Should Local Bar Associations Make Rules for Their Courts?" at the delegates meeting, C. W. Terry of the Madison County Bar Association stressed the fact that what is needed in the state of Illinois is not necessarily a new set of rules for each individual court but a standard set which could be used in all courts. In connection with this, he mentioned and strongly recommended that the Illinois State Bar Association begin anew the struggle to put such a bill through the legislature, and that with the co-operation of the local associations, enough pressure might be brought to bear to force the legislators to realize the importance of these reforms of law.

Clayton W. Mogg, of the Chicago Bar Association, followed this discussion with a talk on "Legal Aid and the Local Bar." "Preparation of Local Bar Entertainment Programs" was the subject discussed by Charles V. O'Hern, of the Peoria Bar Association, who made the suggestion that the local bar associations emulate the local medical associations in the matter of round table discussions led by local members of the profession who have specialized in the subject under discussion. He mentioned that this plan has been used successfully by the Peoria Bar Association during the past few years and recommended it to other bar associations. He referred to the list of subjects and speakers to be found in pages 178 fff. of the 1928 Annual Report of the Illinois State Bar Association as a list of interesting subjects around which to build these proposed round table discussions. He also suggested current and pending legislation as a topic for such discussion.

W. J. MacDonald, of the East St. Louis Bar, addressed the delegates on the subject of "The Grievance Committee of the Local Bar." "Cooperation between Local Bar Associations" was the subject of the Honorable Denis E. Sullivan's address to the delegates. Judge Sullivan, of the Chicago Bar, emphasized the fact that the question of today is "Is organized crime stronger than organized government?" and that the lawyers are one of the most powerful influences in organized government. The Bar of the State of Illinois, he said, must co-operate to combat crime. The local bar associations must co-operate with the newly established Judicial Advisory Council as a first step.

On the same evening as the local bar delegates meeting, the Supreme, Circuit and Superior Court judges met at the Hotel Faust to discuss and formulate plans for the carrying out of the new Judicial Advisory Council. The meeting consisted of a general round table discussion following an explanation of the situation and the new council on the part of the secretary of the State Association, Mr. R. Allan Stephens. Prominent among the comments made at the meeting were those of Judge Frank Comerford, Chicago, who presented the case of the Cook County courts and warned the assembled judges that if something were not done they might look for anything in the way of popular resentment and disapproval.

At the beginning of the discussion, suggestions were made that the matter of changes in laws be left in the hands of the judges of the Supreme Court. This was not approved by the other members of the judiciary because of the fact that the Supreme Court has other business to look after at all times, much of which never should be presented to the high tribunal. Folowing this, the meeting turned to the discussion of the difficulty in getting such measures as might be deemed necessary approved by the legislature. This discussion brought forth considerable argument from the members of the judiciary attending the meeting.

Judge O'Connor, of Chicago, presented the idea of getting ideas as to changes necessary from judges and attorneys alike, submitting them to a clearing house for consideration, assembling and drafting them into bills that would meet with the approval of the legislature. He also expressed the belief that one or two experts in drafting bills should be employed by this judicial council in order that these bills might not be cast aside after entering the general assembly because of improper make-up.

Judge E. D. Shurtlez, of Marengo, proposed an idea which was later adopted as the consensus of opinion of the entire group. He suggested that the judges of the state of Illinois can aid to bring about changes in the practice bill if they will get together, select several changes desired, suggest the changes needed and incorporate them into a bill at least one year in advance of the session of the legislature. The bill then may be presented to the legislators with the assurance that the Illinois State Bar Association and the Illinois judges, as well as the Judicial Council favor the passage of the bill. This would give the lawmakers the correct impression that the proposed bill has been studied carefully by the lawyers and judges alike and that it meets with their approval. That measure, the judge went on to say, would be passed when brought before the legislature. It was further emphasized that in most instances down state members of the legislature worked harmoniously with judges of the Bar and respected any measures that were proposed by the Bar or the judiciary.

At the morning session of the Association held on June 28, the Association continued the consideration of the objects for which it was founded taking up "To cultivate the science of jurisprudence"; "To facilitate the administration of justice"; and "To encourage a thorough and liberal legal education." The first of these subjects was presented by Herbert F. Goodrich, Ann Arbor, Michigan, Advisor on Professional and Public Relations of the American Law Institute, secretary of the Michigan State Bar Association, and recently elected Dean of the University of Pennsylvania Law School. In his address, he urged a complete revision of our present criminal code and outlined the work of the American Law Institute along these lines. He pointed out the startling fact that under our present criminal code it requires no less than 110 days to dispose of a criminal case in the state of Illinois.

In discussing the object "To facilitate

the administration of justice," William D. Knight, Rockford, outlined the efficient work of the Illinois Association for Criminal Justice Survey and discussed the most important of their findings. The third speaker of the morning session, H. C. Horack of Iowa City, Iowa, president of the American Association of Law Schools, discussed the object, "To encourage a thorough and liberal legal education." Mr. Horack covered the whole field of legal and pre-legal education and gave a most interesting picture of present day conditions among the law schools.

At the close of the morning session, the officers for the new year were announced, with John D. Black, Chicago, receiving the election to the office of president. The remaining officers are as follows: First Vice-president, Clarence W. Heyl, Peoria; Second Vice-president, Amos C. Miller, Chicago; Third Vice-president, June C. Smith, Centralia; Secretary, R. Allan Stephens, Springfield; Treasurer, Frank L. Trutter, Springfield; Members of the Board of Governors at large, Sumner S. Anderson, Charleston, and R. V. Fletcher, Chicago.

The remaining objects of the Association were discussed at the annual banquet held on the evening of June 28 at the Hotel Faust. Sidney S. Gorham presented the object "To cultivate and cherish a spirit of brotherhood among the members thereof," while the last object, "To elevate the standards of integrity, honor and courtesy in the legal profession" was divided between two members of the Association. Horace Kent Tenney presented the urban viewpoint of this subject, with Hugh Green, Jacksonville, presenting the rural viewpoint. This closed the most successful annual meeting in the history of the organization.

R. ALLAN STEPHENS, Secretary.

Louisiana

Louisiana Bar Votes for Higher Educational Standards

The annual meeting of the Louisiana Bar Association was held in Lafayette, Louisiana, on Friday and Saturday, May 3 and 4, 1929.

The Executive Committee of the Association selected for the main subject to be brought before the meeting, the proposed revision of the Appellate Courts of the State of Louisiana, and four papers were read respecting this subject: Problems of the Appellate Courts, by Esmond Phelps and George Seth Guion, both of the New Orleans bar, representing the Supreme Court and the Court of Appeal, for the Parish of Orleans, respectively; Charles A. McCoy of Lake Charles, representing the Court of Appeal for the First circuit, Fred G. Hudson, Jr., Monroe, representing the Court of Appeal for the Second circuit. Open forum was participated in.

Reports of the various Committees were read and in some instances action taken thereon, two of the most important of these being the reports of the Committees on Jurisprudence and Law Reform and on Legal Education and Admission to the Bar of the State. Charles E. Dunbar, Jr., of the New Orleans bar, Chairman of the Committee on Jurisprudence and Law Reform, presented the report of that Committee. That Committee recommended the revision of the statutes of the State and its recommendation was adopted by the Association. Ivy G. Kittredge, Chairman of the Committee on Legal Education and Admission to the Bar of the State, presented the report of that Committee, which recommended that the requisite for pre-legal education be at least two years in college or the equivalent thereof, for those students who have been unable to attend high school and college. The recommendation was adopted by the Association.

Dean Robert M. Hutchins, Yale Law School, was the invited guest of the Association and delivered a paper entitled, "Modern Movements in Legal Education." Dean Rufus C. Harris, School of Law, Tulane University, read a paper entitled, "The American Law Institute and the Louisiana Lawyer."

The charter of the Association was amended. This is mentioned principally for two reasons. First: The name of the Association is now the Louisiana *State* Bar Association. Second: Full time professors engaged in teaching law in any of the law schools of the State, are made eligible to become members.

The officers elected at the annual meeting are: Chas. F. Fletchinger, New Orleans, President; Vice-Presidents: Chas. E. Dunbar, Jr., New Orleans, 1st Dist.; Joseph D. Barksdale, Shreveport, 2nd Dist.; U. A. Bell, Lake Charles, 3rd Dist.; Allan Sholars, Monroe, 4th Dist.; Charles C. Bird, Baton Rouge, 5th Dist.; Paul Kramer, Franklin, 6th Dist.; W. W. Young, New Orleans, Secretary-Treasurer.

The Executive Committee is composed of the above officers and Eldon S. Lazarus, New Orleans; R. F. White, Alexandria; Charles A. Duchamp, New Orleans; Charles J. Rivet, New Orleans; Ivy G. Kittredge, New Orleans.

Michigan

Michigan Bar to Have Big Meeting

The thirty-ninth annual meeting, scheduled at Detroit on September 12 and 13 will be the largest meeting of the Michigan State Bar Association in the history of the organization, according to the Michigan State Bar Journal. Not only is the program of unusual interest but the Detroit lawyers have planned social events on a scale never before attempted.

Among the many features of the business sessions will be special reports of the committee on Legislation and Law Reform and the committee on Illegal Practice of Law. Mr. Walter Foster of Lansing and Mr. Renville Wheat of Detroit are chairmen of these committees and both committees are to submit extraordinary recommendations.

Mr. Gurney Newlin of Los Angeles, California, will be in attendance in his official capacity as President of the American Bar Association. He will be the guest of honor at the annual banquet and negotiations are under way for another speaker of national prominence.

North Carolina

Legal Education and Bar Incorporation Chief Topics at N. C. Bar Meeting

The 31st annual meeting of the North Carolina Bar Association was held at the Oceanic Hotel, Wrightsville Beach, near Wilmington, from June 27 to June 29. The meeting was presided over by Alexander Boyd Andrews, of Raleigh, the subject of whose address was "Legal Education." The address of welcome was made by David Sinclair of the Wilmington Bar to which L. T. Hartsell, Jr., of the Concord Bar made a suitable response.

Maj. Matt H. Allen, Chairman of the North Carolina Industrial Commission, made a comprehensive address on the North Carolina Workmen's Compensation Act which went into effect July 1, 1929.

Among the memorial tributes to deceased members were those on the late Clement Manly of Winston-Salem and Harry Skinner of Greenville, former presidents of the State Bar Association and long-time members of the American Bar Association.

The annual speaker of the Association was Hon. Gurney E. Newlin of Los Angeles, President of the American Bar Association, who on the evening of June 28, addressed the Association on "Incorporation of the Bar." As a result of the address increased interest was aroused among members of the Association on the question of bar incorporation.

June 29th a report was made by Prof. M. T. Van Hecke, of the University of North Carolina Law School, on the progress being made on N. C. annotations to the restatement of the Law of Contracts of the American Law Institute. The cost of publishing the annotations will be borne by the State Bar Association.

A delightful motor trip to Fort Fisher and a luncheon was given by the Wilmington Bar who had also entertained the ladies the day before at an enjoyable bridge luncheon.

The membership was increased at this meeting by 110 new applications, making the active membership now 1170, over 60 per cent of the active practitioners in the State.

The following officers were elected: President—T. L. Caudle, Wadesboro; Vice-Presidents—Chas. A. Armstrong, Troy; Kingsland Van Winkle, Asheville; Kenneth C. Royal, Goldsboro; Secretary and Treasurer—H. M. London, Raleigh; Executive Committee—A. Wayland Cooke, Greensboro; A. A. Hicks, Oxford, the holdover members being I. M. Bailey (Chairman), Raleigh; W. S. O'B Robinson, Charlotte; S. G. Bernard, Asheville; W. D. Pruden, Edenton. The President and Secretary are ex-officio members of the Executive Committee.

The following delegates were appointed to the Conference of State and Local Bar Associations, Memphis, October 21-22, 1929: I. M. Bailey, Raleigh; T. S. Rollins, Asheville; J. C. Biggs,

Raleigh. Alternates: L. R. Varser, Lumberton; H. McD. Robinson, Fayetteville; S. G. Bernard, Asheville.

H. M. LONDON, Secretary.

South Dakota

South Dakota Bar's Next Annual Meeting

The next annual meeting of the South Dakota Association will be held at Watertown, South Dakota, on August 28 and 29, 1929. At that meeting addresses will be made by Hon. Gurney E. Newlin, President of the American Bar Association, Hon. O. D. Dynes, General Solicitor of the Chicago, Milwaukee, St. Paul Pacific Railroad Co., Hon. H. R. Hanley, judge of the Seventh Judicial Circuit of this state and Mr. Windsor Doherty of Winner, South Dakota, and Hon. A. K. Gardner, judge of the United States Circuit Court of Appeals of the Eighth Circuit.

KARL GOLDSMITH,
Secretary.

West Virginia

West Virginia Bar Secures Submission of Constitutional Amendments

The Executive Committee of the West Virginia Bar Association are to be congratulated on their successful efforts in urging the passage before the last Legislature of House Joint Resolution No. 4 and Senate Joint Resolution No. 12, according to the "West Virginia Bar Association Notes."

"The first of these was for the amendment of Section 10, Article 8 of the Constitution by permitting more than one circuit court in a circuit. The second was for the amendment of Article 8 of the Constitution by adding Section 31 transferring jurisdiction in matters of probate from the county court to the circuit courts.

"This represents the culmination of the effort of many years on the part of the Bar Association to have these two amendments passed. They were both approved by the Association at its last meeting and the Executive Council were unremitting in their efforts to fully inform the legislature as to their necessity. Mr. T. Brooke Price of Charleston, Mr. Kent Hall of Wheeling, Mr. Charles Paul, Jr., of Wheeling and Mr. Berkeley Minor, Jr., of Charleston, all wrote short pamphlets explaining the purpose of these amendments in detail. The Executive Committee summarized and answered all the arguments which had been urged against them, which summary was presented to all of the legislators.

"The members of the Committee on Judicial Administration and Legal Reform brought the matter to the attention of the legislators from their eight districts. The most effective work, however, was done by Mr. David C. Howard of Charleston who appeared before the committees of the Legislature and is largely responsible for the passage of both of these amendments.

"Little need be said in the pages of this Quarterly as to the advantages to be gained by amending the Constitution in these particulars as the matter has already been discussed in much detail before the Association. The amendment regarding the number of circuit judges will relieve the congested calendars in many of the counties and offer opportunities for other counties to obtain more judges when the necessity arises. The old system of probate administration by the county court had nothing in its favor excepting the natural deference one feels toward old age. It was a constant source of delay and duplication of effort in probate matters."

Colorado

Denver Bar's Memorial Services

Early in June of each year, the Denver Bar Association sets apart one day for services in memory of members who have passed away during the preceding year and in these memorial services the justices of the supreme court, the judges of nisi prius courts, and all members of the local bar participate. It is a custom of long standing here and one which perhaps better than any other exemplifies the true spirit, attitude and fellowship of the profession.

This year, the services were held on Monday, June tenth, in the court room of Division Two of the District Court. At ten o'clock, the hour appointed for the opening of the services, the court room was filled to its utmost capacity with judges, lawyers and relatives and friends of the departed. Judge James C. Starkweather, of the District Court, presided, opening and closing the meeting with earnest, sincere and appropriate remarks, and Edward Ring, Esq., Chairman of the Memorial Committee, introduced the speakers.

Fourteen deceased members were honored by fourteen addresses, appreciatively appraising their personal and professional qualities and activities in life. Each one of these addresses was sincere, each one touching, and each one distinctly worthwhile.

Judge John H. Denison spoke on Charles R. Brock, Henry A. Dubbs on Platt Rogers, Harry L. Lubers on William E. Foley, Harrie M. Humphreys on Rudolphus H. Gilmore, Horace N. Hawkins on William H. Andrew, Erskine R. Myer on Milton Smith, Robert E. Lee on Carl H. Cochrane, Harold W. Perry on Leslie E. Greene, George C. Manly on John Hipp, John F. Rotruck on M. H. Kingore, Henry S. Lindsley on L. Leslie Miles, John Q. Dier on Cregar B. Quaintance, Henry E. May on William A. Rice, and George P. Steele on George L. Sopris. Tyson S. Dines, one of our most distinguished deceased members, had expressed a desire that no eulogy of his life or career be given and accordingly, out of respect for his wishes, no remarks were made concerning him.

If those who complain of the materialism of the age could but attend one of these memorial meetings of the Denver Bar, they would realize that, however true it may be of other groups, the lawyers at least are exempt from the charge.

JOSEPH C. SAMPSON.

Miscellaneous

The seventh annual meeting of the Otsego County (New York) Bar Association was held at Unadilla, June 22nd. Charles C. Flaesch of Unadilla was re-elected for the eighth consecutive term as president, he having served as such ever since the association was organized. Other officers were elected as follows: First vice-president, Orange L. Van Horne, Cooperstown; second vice-president, Alva Seybolt, Oneonta; secretary and treasurer, Albert E. Farone, Oneonta; director, Judge Sheldon H. Close, Oneonta. Charles H. Tuttle, U. S. Attorney for the Southern District of New York was the chief guest of honor and sole speaker. The association voted in favor of a federation of the bar associations of the counties in the sixth judicial district. A committee was appointed to arrange for the observance of Constitution Week, commencing Sept. 15th. The association unanimously endorsed the re-nomination and re-election of Supreme Court Justice Rowland L. Davis of Cortland, whose term of office expires at the end of the current year. Justice Davis is now sitting in the Appellate Division, Third Department, at Albany.

The Christian County (Ill.) Bar Association held its annual meeting and banquet in April. The annual election of officers took place and the following were chosen: President, A. D. Sittler, Taylorville; Vice-President, Charles E. Springstun, Pana; Secretary, Harry B. Grundy, Taylorville.

The annual meeting of the Garland County (Ark.) Bar Association took place on March 12th and the following officers were elected: Richard M. Ryan, President; A. J. Murphy, Vice-President; Sidney S. Taylor, Treasurer, and S. W. Garratt, Secretary.

The Washoe County (Nev.) Bar Association, at its annual meeting February 15th, elected the following officers: M. Gardiner, President; W. B. Ames, Vice-President; Miles N. Pike, Secretary, and A. F. Lasher, Treasurer.

The annual meeting of the Richmond County (N. Y.) Bar Association, was recently held and the following officers elected: C. Ernest Smith, President; Elias Bernstein, First Vice-President; John M. Braisted, Second Vice-President; Ass't Corporation Counsel George Draper, Secretary, and Ernest M. Garbe, Treasurer.

At the annual meeting of the Dunklin County (Mo.) Bar Association held February 19th, James A. Bradley was elected President; Henry C. Walker, Vice-President, and Tom Ely, Jr., Secretary and Treasurer.

Charles J. Stubbs was unanimously elected President of the Galveston County (Tex.) Bar Association at a reorganization meeting held in February. Other officers chosen were: Louis Jeffrey, Vice-President; Henry W. Flagg, Secretary; H. E. Kleinecke, Treasurer.

Judge Noah W. Simpson was elected

President of the Cole County (Mo.) Bar Association at the annual meeting of that organization in February. Other officers chosen were Russell T. Keyes, Vice-President; H. P. Lauf, Secretary, and Tom H. Antrobus, Treasurer.

The 38th Judicial District (Mo.) Bar Association held a meeting and banquet in the month of February at which a permanent organization was chosen and the following officers elected for this year: Sharon J. Pate, of Caruthersville, President; Vice-President, O. A. Cook of Portageville; Secretary, Robert W. Hawkins of Caruthersville; Treasurer, Judge Parrish, Probate Judge of New Madrid County.

At the annual meeting of the Cascade County (Mont.) Bar Association, recently held, W. L. Clift was elected President; H. C. Hall, Vice-President; Phil Greenan, Secretary, and R. E. Crowley, Treasurer.

W. Lee Guice, of Biloxi, was unanimously chosen as President of the Harrison County (Miss.) Bar Association at the annual meeting held in Gulfport, February 16th. J. A. Leathers, of Gulfport, and J. C. Ross were unanimously elected First and Second Vice-Presidents, respectively. Robert W. Thompson was re-elected Secretary-Treasurer.

At a meeting of the Lyon County (Kan.) Bar Association in the month of March the Fifth Judicial District Bar Association was organized and the following officers were elected: President, Wilford Riegle; Secretary, Ray Pierson; Treasurer, Harry O'Reilly. L. H. Hannen, of Burlington; Robert Blackburn, of Cottonwood Falls, and O. R. Stites, of Emporia, were named as Vice-Presidents.

The Hutchinson County (Mo.) Bar Association was organized at a meeting and banquet on March 24th, and the following officers were chosen: Judge W. C. Witcher, President; Norman Coffee, Vice-President; J. W. Spivey, Jr., Secretary, and H. G. Bennett, Treasurer.

For the tenth consecutive time, M. J. Carey was elected President of the Jasper County (Iowa) Bar Association at a meeting of that organization held recently. Other officers elected to serve during the coming year were Laurence L. Brierly, Vice-President; Robert W. Cooper, Secretary; A. M. Miller, Treasurer, and an executive committee to consist of Judge Henry Silwold, E. M. S. McLaughlin and O. P. Myers.

Ralph G. Wiggenhorn was elected President of the Yellowstone County (Mont.) Bar Association at a recent meeting of that Association. Grover C. Cisel was chosen Vice-President, and Melvin Hoiness, Secretary-Treasurer.

P. M. Moody, of West Point, was elected to the Presidency of the Bar Association of the Ninth Judicial District (Neb.) at a recent business meeting of that Association. W. P. Cowan, Stanton, was named Vice-President; Carl H. Peterson, of Norfolk, was re-elected Secretary, and Roscoe Rice, of Creighton, was made Treasurer.

The following officers were elected f the ensuing year at a meeting of t Wichita County (Tex.) Bar Associati in April: Tarlton Morrow, Presider Joe Hatchitt, Vice-President; W. P. Ba Secretary-Treasurer, and Sam Hollida Sergeant-at-Arms.

The Boulder (Colo.) Bar Associati held its annual election of officers at luncheon on April 1 and the following o ficers were chosen: Edward Affolt President; John T. Morgan, Vice-Pre dent; Rudolph Johnson, Secretary; C. Bromley, Treasurer (the three officers la named being re-elected).

APPLICATION FOR MEMBERSHIP

To The American Bar Association,
209 S. La Salle St., Chicago, Ill. .....192...

I hereby make application for membership in the Association and certify the following:
(a. I have been a member in good standing of the Bar of the

State (or States) of.....since .....

I am a member of the following Associations of the Bar.....
(b) I am White ☐ Indian ☐ Mongolian ☐ Negro ☐

NAME.....

MAILING ADDRESS.....

CITY and STATE.....

Endorsed by.....Address.....

Check to the order of American Bar Association for $.....is attached.

If this application is made between July 1 and September 30, the check should be for $8.00; if between October 1 and December 31, for $6.00; if between January 1 and March 31, for $4.00, and if between April 1 and June 30 for $2.00.

The annual dues are $8.00. A member receives the monthly American Bar Association Journal beginning with the month of his election, and the report of the annual meeting of the Association. This report is a record of the activities of the Association and contains a list of the members.